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POWER OF COURT TO SET ASIDE SUCCESSIVE VERDICTS IN FAVOR OF THE SAME PARTY ON THE GROUND THAT THEY ARE CONTRARY TO THE WEIGHT OF THE EVIDENCE.

The interference of the trial court with the prerogatives of the jury is often quite presumptuous and aggravating. Under our system of legal procedure the jury are the triers of the fact, and it is no part of the business of the trial court to review or interfere with the verdict unless the result arrived at is in disregard of its instructions or evidences undue passion or prejudice. As this question, however, is left altogether in the discretion of the trial court, a difficulty, quite readily appreciated, is met with in attempting to determine when a trial court has abused its discretion in the exercise of its power in this direction; for which reason, the general rule is well settled that in cases where a new trial has been granted, the appellate court will not generally revise such exercise of discretion on the part of the trial court. Allen v. Milwaukee, 72 Wis. 182; Pratt v. Press Co., 32 Minn. 47; Alexander v. Humber 86 Ky. 565.

This being the general rule the question arises what limit, if any, is there to the right of the trial court to set aside the verdict of successive juries in the same case. On this point the decision of the court in the recent case of McGann v. Railroad Co., 76 N. Y. S. 684, is interesting. This case was tried four times, each trial resulting in a verdict for the plaintiff. The first verdict was for $6,000. On appeal it was set aside as against the weight of the evidence. On the second trial, the plaintiff again recovered a verdict of $6,000 and on appeal the judgment was again reversed on an exception to a charge. The third verdict was for $12,000, which was set aside because excessive. The last verdict was for $5,500, which the trial court again set aside as against the weight of the evidence. On appeal the supreme court was asked how long this thing was to go on. That court, however, had already ruled that a verdict of $6,000 was against the weight of the evidence, and here on this appeal the facts were the same, or, if anything, more favorable to the defendant than before. The court seemed to be in a quandary as to whether its own opinion or that of the jury was to control in this case. Their decision however, was prompt and decisive in favor of the authority of the jury to finally determine all questions of fact, holding that where four successive juries in an action for personal injuries have brought in verdicts for the plaintiff, the last verdict should not be set aside as against the weight of evidence, unless the circumstances are extraordinary, and the verdict clearly outrageous.

This decision should tend to increase the confidence of the people in the ascendancy and perpetuity of the jury system which has been so severely attacked in these latter days. The opinion of Laughlin, J., speaking for the court in this case, evidences a most high appreciation of the great importance of an unhampered exercise of its high prerogatives by the petit jury under our system of legal procedure. He says in part: "There is, it is true, no express limitation as to the extent to which the trial court may exercise the power to set aside a verdict, but this authority is to be construed in the light of the settled practice of the courts. Where the right to a jury trial exists, it is intended that the verdict of the jury shall be conclusive upon the facts in the absence of legal error or bias, passion, prejudice, or corruption. Verdicts are set aside as against the weight of evidence, and new trials are granted on the theory that the jury have been influenced by bias, passion, prejudice, or corruption. While the trial court and the appellate division should not hesitate to set aside a verdict as against the weight of evidence where the ends of justice appear to require a new trial, yet, when it comes to setting aside a third verdict rendered in an ordinary action possessing no extraordinary features, the court should hesitate lest it usurp the functions of the jury. A sufficient number of trials has now been granted to remove any suspicion of the existence of bias, passion, prejudice, or corruption, and it becomes a mere matter of judgment on questions of fact. The administration of jurisprudence, where trial by jury is preserved, goes upon the theory that the judgment of twelve laymen upon a question of fact is safer than that of a smaller body of

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judges, who are more removed from the people. An unwarranted exercise of this power would sooner or later bring the judiciary into disrepute. We think any further interference with the verdict of the jury in this case would be unauthorized and unjustified."

It cannot be said that this question is entirely free from doubt, at least, from a technical standpoint. In the case we have just noted two justices dissented,one of whom, McLaughlin,J.,fairly presents the arguments supporting the position contrary to that taken by the majority of the court, in the following language: "It is said the order for a new trial should be reversed, and the verdict reinstated, because a jury has four times found in favor of the plaintiff. A wrong committed, no matter how often, never makes a right. This verdict is wrong. It is the result of misconception, prejudice, or partiality, and ought not to be approved by the court. Upon substantially the same state of facts we have several times declared that the plaintiff ought not to recover, and yet we are about to permit a recovery because the jury forsooth have for the fourth time committed the same wrong. The law imposes a duty upon this court to review verdicts, and whenever it can be seen that injustice has been done by reason of the jury not properly considering the evidence, or that its action has been influenced either by prejudice or partiality, then the court ought, in the discharge of its duty, to fearlessly exercise the power given to it by the statute, and right the wrong by setting the verdict aside and ordering a new trial, and this as many times as may be necessary to accomplish the proper result. Justice never tires, and an act ought not to be approved in its name which wrongfully takes property from one person and gives it to another."

The decision of the court in this case is sustained by the authorities. Thus, in Hazzard v. Savannah, 77 Ga. 54, it was held that where three new trials were granted, each resulting in a verdict for the plaintiff in an action for personal injuries chargeable to negligence, to order another trial is reversible error. Sometimes a second verdict has been set aside as against the weight of evidence; but "unless the circumstances are extraordinary, and the verdict is clearly outrageous, a court is not justified in setting aside a third verdict upon the same facts." Dorwin v. Westbrook, 158 N. Y. 742, 53 N. E. Rep. 1124; Wilson v. Gordon, 20 Tex. 568; Wolbrecht v. Baumgarten, 26 Ill. 291; Wright v. Adams, 12 Mo. App. 376; Clark v. Jenkins, 162 Mass. 397, 38 N. E. Rep. 974.

NOTES OF IMPORTANT DECISIONS.

TAXATION—SITUS OF PERSONAL PROPERTY UNDER THE COLLATERAL INHERITANCE TAX.—It is the general rule that the *situs* of intangible personal property, such as bonds, notes, stocks, mortgages, and other evidences of debt, follows the domicile of the owner. An exception to this general rule, in the case of the collateral inheritrnce tax, is well stated in the recent case of *In re* Lewis' Estate, 52 Atl. Rep. 205,where the Supreme Court of Pennsylvania held that intangible personalty of a non-resident decedent is subject to the collateral inheritance tax within the state, where the executor, having taken out ancillary letters, elects to have full distribution of the fund made there, and this is acquiesced in by the legatees. The court held further that the same result would follow where the property is in the custody and control of a resident agent, with power of investment and reinvestment.

The result would seem to conflict with the decision of the same court in Orcutt's Appeal, 97 Pa. 179, where this same court held that the court of the testator's domicile must determine all questions concerning the devolution of personal property and the assessment of the collateral inheritance tax. In that case, however, the securities were in the state merely for safe keeping, while in the principal case they were in the hands of agents for the purpose of investment and reinvestment. On this ground the court distinguishes the case of Orcutt's Appeal, *supra*.

LARCENY—WHETHER THE PRODUCE OF LIVING BEINGS OR SUBSTANCES IS THE SUBJECT OF LARCENY.—A case of rather an unusual character came before the police magistrate at Stratford a few days ago. The defendant was charged with stealing horsehair, and the evidence showed that the hair was cut from the tails of a number of horses while they were grazing upon a rifle range at Ilford. Some doubt seems to have arisen as to whether the case was one of larceny, for the charge was altered to one of malicious injury, under which the defendant was duly convicted. There seems, however, to be authority for treating the case as one of larceny. In Rex v. Martin, 1 Leach, 191, the prisoner was indicted for feloniously stealing twenty pounds weight of wool,and it appeared by the evidence that he had pulled the wool from the bodies of sixteen lambs whilst they were living. The property being taken from the bodies of living animals, a doubt arose whether it was the subject of larceny. The judges were of opinion that the offense was proved, the principle they went upon being that when larceny

may be committed of the thing itself it may also be committed of the produce of that thing, therefore it is no larceny at common law to gather and carry away the fruit from a tree which is growing, because from its adherence to the soil it is not larceny to steal the tree itself. Reference may also be made to the case of stealing milk from a cow. We cannot remember any case where anyone was charged in a criminal court with wrongfully cutting off the hair of a human being with the object of selling it as an article of value. But according to the reasoning in Rex v. Martin the offense would not amount to larceny. The offender, however, need not go unpunished, for it has been held to be an actionable wrong to cut off the hair of the plaintiff against his will, inasmuch as it constitutes an assault, and such an assault could no doubt be the subject of criminal proceedings. When the property taken is of trifling value, much must depend upon the special circumstances, and in a criminal court there must be clear and satisfactory evidence of the evil disposition of the defendant. This observation, however, applies to all cases of larceny.—*Solicitor's Journal.*

HIGHWAYS — CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN IN WALKING ON SIDEWALK AT NIGHT.—The degree of care which some courts seem to require of a pedestrian on the public highway is sufficient sometimes to confuse the most intelligent and careful citizen. It has generally been supposed that when a city or a township constructs a sidewalk in addition to the main highway, the latter was to be reserved for teams and conveyances and the former for pedestrians. Nor would there seem to be any reason to make any distinction between travel by night or day in the application of this rule. This apparently well established supposition seems to be controverted in the recent case of Siegler v. Wellinger, 52 Atl. Rep. 175, in which the Supreme Court of Pennsylvania held that it is presumptive negligence for one on a dark night to walk along the side path of a country road; the middle of the road at such a time being the proper place. The court makes this remarkable argument in support of its position:

"A man desiring or being compelled to travel an unknown road on a dark night must always be in some uncertainty, if not peril. The middle of the road is usually the freest from obstructions, and in the best condition for travel, and therefore is *prima facie* the proper and safest place to go, notwithstanding its special disadvantages in the risk of collision with vehicles having also a right of way. On the other hand a side path perhaps offers smoother and more comfortable walking, but is liable to its own special dangers, such as produced the accident in this case. Plaintiff testified that the cinder side path at the point where he turned onto it, and along most of the distance, was level, or nearly so, with the rest of the roadway. In cities or municipalities, where there is a well-defined sidewalk, and on the country roads in daylight, the side is usually the proper place for foot passengers, and circumstances might be shown as to the condition of the side path and of the general roadway that would make a question for the jury whether a traveler, even in the dark, might not be justified in following the former instead of the latter; but the presumption is that it is negligence to do so on a dark night on a country road. The circumstances testified to in the present case were not sufficient to overcome this presumption."

The general rule on this question as settled by the authorities is that a foot passenger on the sidewalk, who, with full knowledge of the dangerous character of an obstruction on the pavement, deliberately attempts to walk over it when he could have avoided it by a slight detour into the street, and who falls and is injured in such attempt, is guilty of contributory negligence *per se*. Baker v. Fehr, 97 Pa. St. 70; Quincy v. Barker, 81 Ill. 300; Coates v. Canaan, 51 Vt. 131; Schaefer v. Sandusky, 33 Ohio St. 246; Massey v. Columbus, 75 Ga. 658; Gosport v. Evans, 112 Ind. 133. But the mere fact that plaintiff knew that the sidewalk was defective does not conclusively prove contributory negligence on his part. A municipality cannot by failing to keep a street in repair deprive the public of the right to use it absolutely. Maultby v. Leavenworth, 28 Kan. 745; Frost v. Waltham, 12 Allen (Mass.), 85; Rice v. Des Moines, 40 Iowa, 638; Weed v. Ballston, 76 N. Y. 329; Wheeler v. Westport, 30 Wis. 392; Shook v. Cohoes, 108 N. Y. 648. A case similar to the one from which we have quoted is that of Maultby v. Leavenworth, 28 Kan. 745, where it was held that plaintiff was not guilty of contributory negligence in walking upon a sidewalk after dark, even though he knew it was defective. The true rule would therefore seem to be opposed to that announced in the principal case. The proper place for the pedestrian is upon the sidewalk, and a city is bound to keep its streets in a reasonably safe condition for persons to pass thereon by night as well as by day.

DESCENTS AND DISTRIBUTIONS—LIABILITY OF A PURCHASER FROM AN HEIR PENDING ADMINISTRATION FOR DEBTS OF HEIR.—On the question stated in the subject of this note the recent case of Russell v. Smith, 88 N. W. Rep. 361, is interesting. In this case decedent left real estate to nine heirs, one of whom conveyed his interest to plaintiff who files this action in partition against the other heirs. The latter claim plaintiff's grantor had no interest in the estate because of advancements made to him. The evidence, however, showed that at the time of decedent's death he held the notes of plaintiff's grantor amounting to something over $4,700, which defendants unsuccessfully attempted to prove was intended as an advancement. In distinguishing between a debt and an advancement in this class of cases the Supreme Court of Iowa makes this clear statement of the law:

"If the evidence established an advancement to the son, then plaintiff would take the land subject thereto, although he had no notice thereof before purchasing. But, as there was no advancement, the question remains, does a purchaser of real estate from an heir pending administration on the estate of the deceased take it subject to the debts of that heir? Herrick & D. Prob. Law (2d Ed.), pp. 387-388, seems to hold that he does. But we do not regard this statement as correct. True, we have held that a purchaser takes subject to an advancement to an heir, whether with or without notice. Finch v. Garrett, 102 Iowa, 383, 71 N. W. Rep. 429; Pinckney v. Pinckney (Iowa), 87 N. W. Rep. 403. But we have never held that he takes subject to a debt. Indeed, the contrary seems to be the rule in this state. Rider v. Clark, 54 Iowa, 292, 6 N. W. Rep. 271. This doctrine is also supported by the weight of authority, as well as of sound reason. La Foy v. La Foy, 43 N. J. Eq. 203, 10 Atl. Rep. 233, 3 Am. St. Rep. 302; Sartor v. Beaty, 25 S. Car. 293; Proctor v. Newhall, 17 Mass. 81; Mann v. Mann, 12 Heisk. 245; Scobee v. Bridges, 87 Ky. 427, 9 S. W. Rep. 299; Steele v. Frierson, 85 Tenn. 430, 3 S. W. Rep. 649. That there are authorities to the contrary is conceded, but they fail to note the manifest distinction between a debt and an advancement. See Oxsheer v. Nave (Tex.), 40 S. W. Rep. 7, 37 L. R. A. 98, and cases cited. There may be cases where, on account of the insolvency of the debtor, or for some other cause, equity will interfere for the protection of the estate, but this is not one of them. There is no showing that George Stahlay is insolvent, and no reason for not applying the general rules of law hitherto stated. The administrator holds a claim against Stahley, which it is his duty to enforce. This claim is not a lien on Stahley's property until reduced to judgement. To administer on the estate of a deceased in a partition proceeding, and to adjust claims in behalf of and against the estate, would be novel, to say the least."

RIGHT OF OFFICER TO AMEND HIS CERTIFICATE OF ACKNOWLEDGMENT.

It not unfrequently happens that after a deed to other conveyance has been executed, acknowledged and delivered to the grantee, the latter finds that the certificate of the acknowledgment is defective,—the officer having omitted to attach his seal, or to state his official character, or to fill some blank with an essential word, or to sign the certificate, or to state that he knew the grantor, or has made some mistake in the names of the parties,—and the grantee thereupon carries it back to the officer, with a request that he make the proper and necessary correction. So apparent is it to the common reason of men as being the right of the officer to properly complete the discharge of his duty in the premises,—thus relieving himself of his liability for damage to the grantee and grantor alike resulting by reason of his failure to discharge such duty,—that the proper correction is usually made without hesitation or question. Yet, under what has been judicially declared the decided weight of authority, his action in making the correction, or in issuing a proper certificate in lieu of the abortive one, is unauthorized and void.[1] It has been well said, however, that nothing is law that is not reason; and a discussion of the question whether that is really the law is the purpose of the present article. The mental processes by which a conclusion so opposed to reason has been reached appear from the decided cases to have involved argument from false premises, deduction from matters not analogous, a confusion of terms, and a failure to observe distinctions which manifestly exist, supplemented by an unfortunate tendency on the part of some of the courts to follow precedent, especially where the precedent is set by so august a tribunal as the Supreme Court of the United States, whose errors live after the judges that committed them even unto the third and fourth generation.

The leading case on the subject is that of Elliott v. Peirsol,[2] which arose under the somewhat peculiar law of Kentucky in reference to the action of the clerk of the county court in taking the acknowledgment and recording the deed of a married woman, all of which the statute seems to have provided for as a continuous act, or connected series of acts which that officer alone might perform. He had made out a defective certificate of the acknowledgment, and had recorded the deed thereon; and the point decided in the federal supreme court was that the county court had no power to order the clerk to amend his certificate in accordance with the facts, as it had done. The courts hold (under the Kentucky statute) that it is not

[1] Elliott v. Peirsol, 1 Pet. 328; Bours v. Zachariah, 11 Cal. 281, 70 Am. Dec. 779; Durham v. Stephenson (Fla.), 25 South. Rep. 284; Hodges v. Winston, 95 Ala. 514; Griffith v. Ventress, 91 Ala. 366, 24 Am. St. Rep. 918; Wedel v. Harmon, 59 Cal. 507; Enterprise Transit Co. v. Sheedy, 103 Pa. St. 492; McMullen v. Eagan, 21 W. Va. 233; Merritt v. Yates, 71 Ill. 636, 22 Am. Rep. 128.

[2] 1 Pet. 328.

the fact of the privy acknowledgment only, but the recording of the fact, that makes the deed of a *feme covert* effectual; and further on, in remarks made in reply to the contention of counsel that the officer might properly have amended his certificate without such order, the court says: "We are of the opinion he acted ministerially and not judicially in the matter. Until his certificate of the acknowledgment of Elliot and wife was recorded, it was in its nature but an act *in pais*, and alterable at the pleasure of the officer, but the authority of the clerk to make and record a certificate of acknowledgment of the deed was *functus officio* as soon as the record was made. By the execution of his authority the authority itself became exhausted. The act had become matter of record, fixed, permanent and unalterable, and the remaining powers of the clerk were only to keep and preserve the record safely. If a clerk may, after a deed, together with the acknowledgment or proof thereof, have been committed to record, add anything to the record of the acknowledgment, we can see no just reason why he cannot subtract from it. The doctrine that a clerk may at any time without limitation alter the record of the acknowledgment of a deed made in his office, would be, in practice, of very dangerous consequence to the land titles of the country, and cannot receive the sanction of this court."

It is to be observed here that this *dictum* in this case was in reference to the certificate of a married woman's acknowledgment under a law which, it seems, made the recording of the deed essential to giving it effect, and that it is confined to the power of the clerk to alter or amend after the record of the deed has been made, inferentially admitting his power to amend before that is done, and the case does not therefore necessarily support an application of the rule to instances where the deed is not that of a married woman, or where it has not been recorded, or recording is not essential to its validity and effect. It is to be further noticed that the subsequent cases in this line also involve the separate acknowledgment of the married women's deeds, the taking of which is usually held to be an act judicial in its character. Thus, in Merritt v. Yates,[3] it is said the action of the officer in taking the separate acknowledgment is clothed with the same force and effect that was anciently produced by the judgment of a court of record in the fine and recovery by which alone a married woman could convey at common law,—and hence the rule is there applied that such amendment to the record could only be made after notice to the other party.

In Bours v. Zachariah,[4] involving the separate acknowledgment of a married woman, the court first decided that the officer could amend his certificate, but on rehearing reversed that conclusion, and in a labored opinion endeavored mainly to show why the functions of the notary had ceased when he had delivered over the certificate,—not when the deed had been recorded. "The officer derives his power from the statute," the court said, "and acts as under a special commission for that particular case, clothed with limited statutory powers. He is to take the acknowledgment and certify it as part of the same transaction. After taking the acknowledgment and making and delivering the return, his function ceased, and he is discharged from all further authority and cannot alter or amend his certificate." In Griffith v. Ventress,[5] also a married woman case, the ground is gone over again at much length, the arguments already made are repeated, but with no substantial addition, the court declaring, as did the California court, that the officer acts judicially in taking such acknowledgment, and the opinion concludes: "If courts of law and equity are powerless to inquire into and determine the correctness of these certificates and change them in accordance with the real facts, it is difficult to perceive why such powers should rest with the officers who made them." A sufficient answer to this is that the statute has intrusted the duty of making the certificate to the officer, and not to the court; and the question here is whether the courts will interfere with his action and deny his right to properly make it because of a previous attempt to do so which was without legal effect. In Durham v. Stephenson,[6] the latest case on the subject, and also involving a married woman's separate acknowledgment, the decision that the officer has not the power to amend is rested

[3] 71 Ill. 636.

[4] 11 Cal. 281.

[5] 91 Ala. 366.

[6] (Fla.) 25 South. Rep. 284.

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simply on the point that when he has delivered his certificate his power has ceased, and that the weight of authority is to that effect. It is not believed that the two or three other cases denying the right of the officer to amend, as given in the first note below, add anything to the argument in favor of the rule.

The Reason of the Matter.—In considering in detail the reasons advanced in the foregoing cases it may be noticed that in Elliott v. Peirsol, the denial of the officer's power to amend is put on the the ground, among others, that his action in taking the acknowledgment is ministerial in character, although that case was one wherein, with greatest advantage, the court might have held it to be judicial in its nature. In the California case, as in others, the ruling it put largely upon the ground that the officer's action is in its character judicial and not ministerial; and yet in the case of Banbury v. Arnold[7] the California court has itself declared, as was declared in Harmon v. Magee,[8] that while the taking of a married woman's acknowledgment is an act judicial in character, the making out of the certificate is a purely ministerial act,— and the question here involves only the ministerial feature. We are therefore, as to this particular point, presented with merely a jumble of contradictions, without its being made to appear how the character of the action, as being judicial or ministerial, can properly affect the question of the officer's right to amend. A court has the power, of its own motion, to amend its orders and judgments at any time during the term, and the denial of its power to so amend after the term rests upon the fact that the statute has prescribed certain defined terms of the court for the exercise of its judicial power. But as to the taking of acknowledgments the statute has not so prescribed, and the official term of office affords the only limitation as to the time when such power may be exercised. In Stevens v. Martin[9] it is held that the certificate need not be made at the time of acknowledgment, and that an interval of several years between such time and the making of the certificate was not fatal to the admissibility of the deed in evidence as a recorded instrument. The proposition that the judicial act of taking the acknowledgment and the ministerial act of certifiying it are, in legal contemplation, but one act,—a conclusion derived perhaps by analogy from the theological doctrine of the Trinity,—does not seem to have any appropriate application to this subject. Nor does the objection that the officer should not be permitted by amendment to contradict his certificate find application here, for, as said by the Kentucky court, in Ralston v. Moore[9a], the officer does not contradict his certificate by adding what will make it a legal certificate. Until the certificate complies with the statute it is without legal effect, and there is consequently, in contemplation of the law, nothing to be contradicted. Upon grounds of public policy it is properly held that the officer may not himself deny the truth of the recitals in his certificate, or destroy the effect of a legal certificate he has issued, either by evidence in court or by amendment out of it.[10] That, however, is wholly different from the case here under consideration, where there is only a paper purporting to be a certificate, and showing upon its face that the duty of the officer to certify the acknowledgment has not been properly discharged or completed. For the officer to complete his certificate, as by attaching his seal, or adding anything which the law requires of a valid certificate, is an action not contradictory in its nature, but rather the opposite, the reasonable presumption being that his original intention was to do a legal act, and to perform his duty by the issuance of a legally sufficient certificate.

The use of the term "amendment" in this connection is calculated to mislead the unthinking, and is doubtless the cause of some of the confusion in the reasoning on the subject. The certificate of acknowledgment, being dependent on the statute, is fatally defective if any part of the statutory requirements, even the least, be omitted. The omission of the official seal, where the statute requires a seal, is as fatal at a failure to state who made the acknowledgment, since without the seal the record of the deed will not impart constructive notice, nor authorize it to be given in evidence as a recorded instrument without proof of its execution. When the officer's attention is called to the fact that his

[7] 91 Cal. 606.
[8] 57 Miss. 415.
[9] 18 Pa. St. 101.
[9a] 83 Ky. 71.
[10] Stone v. Montgomery, 35 Miss. 83; Hockman v. McClannahan, 87 Va. 33; Shapleigh v. Hull, 21 Colo. 419; Green v. Godfrey, 44 Me. 25; Bank v. Copeland, 18 Md. 305, 81 Am. Dec. 597.

certificate is not sufficient, the better course for him is to then make out the proper certificate, without reference to his former abortive attempt to do so; and where, for the sake of convenience, he uses the former paper, his action is an amendment only in relation to such use of the paper,—and in such case it is often not made to appear at what date a legal certificate was completed by virtue of the amendment.

The case of an officer taking a deposition by virtue of a special commission issued to him by the court, and which he is to return to the court, has been referred to as showing that his power ceases when he has made his return, but is not analogous to that of the taking of acknowledgments. In the one case the officer acts alone by virtue of the special commission empowering him to do a single thing, and, of course, loses his power when he surrenders and returns the commission. In the other case he acts by virtue of a general power conferred by the statute, authorizing him to take acknowledgments generally, and the commission by virtue of which he acts, his official commission, is not surrendered, but is retained, and continues in force until the expiration of his term of office.

The proposition that a power in the officer to amend (that is, to properly certify after having attempted and failed to do so) will lead to the disturbance of titles and endanger the landed interests of the country, does not appear to be well founded, for the reason that, under the general and well recognized principles of law and equity, the intervening rights of third parties that may have attached in good faith before the making of the amendment cannot be affected by it.[11] If, for example, the deed has been recorded on the defective certificate, and another person has afterwards purchased the same property from the grantor without actual notice of the prior conveyance, he cannot be charged with constructive notice by virtue of the defective record, and his rights are not affected by anything subsequently done in relation to that record. Nor is the supposition that the officer may certify falsely in making the amendment, the legal and sufficient certificate, warranted by anything in the nature and reason of the case. He is still under the sanction of his oath and the penalties of his bond, and it cannot be reasonably presumed that he is any more likely to certify falsely in the second instance than in the first, —in the making of a proper certificate than in the making of an improper and illegal one. The grantor, having imposed upon the officer the duty of making out a legal certificate of his acknowledgment, has no right to object to his doing so merely because his completion of the duty is by amendment or the issuance of a proper certificate in lieu of the defective one. As to him it is suffcient for the law to hold as done that which he attempted to do and to have done.[12] When he delivers the deed without acknowledgment, leaving the grantee to have it proved for record by the subscribing witnesses, the fact that the grantor may have to apply more than once to the officer to get a perfect certificate of the proof made out is a matter in which he has no concern, and the case is not different in principle where he has himself made the acknowledgment. In all the states yet requiring a separate acknowledgment of married women, except perhaps two or three where the title does not pass until the deed is recorded, it is now held that the title passes by virtue of a due acknowledgment actually made by the wife and not by virtue of the certificate thereof, which, if it fails to make a legal and sufficient statement of the acknowledgment as actually made, may be, in some of the states, corrected by the court upon proper proof under statutes authorizing that to be done.[13] It follows that, with the limited exception indicated, there is, as to the officer's right to amend his certificate, no difference in principle between the separate acknowledgment of a married woman and the ordinary acknowledgment. Where the married woman has not in fact made an acknowledgment in compliance with the statute, the officer could not properly so certify in the second instance, by amendment, any more than in the first, and her title does not pass.

The Opposing Cases—Officer May Amend. —The courts of several of the states hold that the officer has the right to amend his certifi-

[11] The recording officer has the right to correct mistakes made by him in recording the deed, subject, of course, to any rights of third persons that may have accrued on the faith of the record as first made. Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260; Baldwin v. Marshall, 2 Humph. 116.

[12] Jackson v. Colven, 4 Cow. 266.

[13] Johnson v. Taylor, 60 Tex. 360, citing Webb v. Den, 17 How. 578; Howard v. Most, 64 N. Y. 268.

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cate of acknowledgment so long as he continues in office.[14] It is worthy of notice that in none of the cases of this character has it been thought necessary to argue the matter at length, as has been done on the other side. A proposition to the effect that white is white does not require as much logical demonstration as one assesting that black is white, although the latter is of the kind that sometimes appeals most strongly to the logical powers and controversial abilities of the learned judges. The first of these cases is that of Jordan v. Corey,[15] wherein it was held that the officer had the right, and it was his duty, to correct any mistake in his certificate, and that his act was proper in inserting in his certificate of a married woman's acknowledgment the statement that she was examined out of the hearing of the husband." Such a certificate," the court says, "is an act *in pais* which may be altered at any time by the officer who made it," citing Elliott v. Peirsol.[16] In Westhaver v. Patterson,[17] this is again asserted with reference to precisely the same character of omission; and in Scott v. Harrison,[18] where a notary was sued for damages resulting from his failure to attach his notarial seal to a certificate of acknowledgment before its record, the court says that if in truth he had not stamped his seal on the instrument (that matter being disputed in the evidence), it was still his right and duty to have done so after his attention was called to it. In Chicago, B. & Q. Ry. v. Lewis,[19] a notary had defectively certified an acknowledgment, and three years thereafter, without reacknowledgment, gave a further certificate in due form, and it was urged that the second one should be disregarded, because when the notary acted once his power over his certificate ceased; but the court held the objection not tenable, and that the deed was properly admitted in evidence without further proof of its execution, saying that "while the notary continued in office, it was competent for him to amend his certificate, provided the amendment is in accordance with the real facts." Hanson v. Cochran[20] was a case wherein, when a mortgage was presented for record, it was noticed that the certificate failed to show that the parties acknowledging it were known to the officer, and it was carried back to him, and he made the proper and necessary correction, and the instrument was thereupon recorded, and his action was sustained, the court saying that it was entirely competent for him to perfect his certificate by making it comply with the requirements of the statute, and that there could be no question as to his right to supply such an omission where there is no *mala fides*. In Harmon v. Magee,[21] the officer taking a married woman's separate acknowledgment failed to sign his name to the certificate, and it was recorded, and ten months thereafter, discovering the omission, he appended an additional certificate to that effect, and this was sustained, the court saying that the ministerial act of making out the certificate, where the rights of third parties have not intervened, may be done at any time while the officer remains in office. It is contended in Griffith v. Ventress, *supra*, that this case is not in point, since the grantor was again before the officer, it appearing that before making the correction the officer informed the wife of the mistake, and she then admitted that she had made an acknowledgment ten months before; but as the officer already well knew that fact, and as she did not make any reacknowledgment, such as would comply with the statute, the fact that the officer saw her again is of no legal consequence, although he may have supposed it would afford him some sort of moral, if not legal, defense by way of estoppel in the event she should complain of his action in making the correction. In Ralston v. Moore,[22] the county clerk, in writing out the certificate of an acknowledgment taken by his deputy failed to set forth the facts and include the indorsement made on the deed by the deputy, which should have been included by him in the certificate when he recorded the instrument, and it was held

[14] Jordan v. Corey, 2 Ind. 385, 52 Am. Dec. 516; Stott v. Harrison, 73 Ind. 17; Westhaver v. Patterson, 120 Ind. 459, 16 Am. St. Rep. 339; Chicago, B. & Q. Ry. v. Lewis, 53 Iowa, 101; Harmon v. Magee, 57 Miss. 415; Ralston v. Moore, 83 Ky. 71; Wannall v. Kem, 51 Mo. 150, 57 Mo. 478; Miller v. Powell, 53 Mo. 252; Attleboro Bank v. Hughes, 10 Mo. App. 7; Stone v. Sledge, 87 Tex. 49; McKeller v. Peck, 39 Tex. 381; Hanson v. Cochran, 7 Houst. (Del.) 184, 31 Atl. Rep. 880; Cox v. Holcomb, 87 Ala. 589, 53 Am. St. Rep. 79.

[15] 2 Ind. 385.

[16] 1 Pet. 328.

[17] 120 Ind. 459.

[18] 73 Ind. 17.

[19] 53 Iowa, 101.

[20] 7 Houst. (Del.) 184.

[21] 57 Miss. 410.

[22] 83 Ky. 71.

that he might correct the mistake. In Miller v. Powell[23] it is said that the remedy when the certificate of acknowledgment is defective is to apply to the officer to put his certificate in form, and if he refuses to comply he may be compelled by *mandamus* to do so; and declarations to the same effect are found in Wannall v. Kem,[24] and are referred to with approval in Bank v. Hughes.[25] In Gilbraith v. Gallivan[26] the cases of Wannell v. Kem and Miller v. Powell are criticised as being *dictum* the criticism itself being also *dictum*, since the point there decided was merely that one who was no longer an officer had not the power to amend a certificate given by him while he was an officer.[27] The weight of *dictum* in the Missouri cases is therefore decidedly in favor of the officer's right to amend, and as the opposing doctrine is, as already seen, founded on *dictum*, it ought not to be seriously complained that the contrary view is likewise supported to some extent by authority of that character. Stone v. Sledge[28] was a case wherein, when it was before the court of civil appeals below,[29] that tribunal had held, basing its holding merely upon the weight of authority, that the officer had not the right to amend his certificate of acknowledgment. The case having been carried up to the supreme court by writ of error was there disposed of on another point, but that court took occasion to say, referring to the question as to the power of the officer to amend: "If the point were before us, we are inclined to think that we should be constrained to hold that the officer, while in office, had the power to amend his certificate. There has been no decision in this court upon the question, but the previous intimations of the court are in favor of that view,[30] though the weight of authority elsewhere supports the opinion of the court of civil appeals."

There are doubtless yet other cases where amendments to the certificate have been sustained without the matter attracting attention, but I have not had opportunity to look them up and examine them. Those already noted, having the better reasoning in their favor, are believed to afford sufficient authority for the statement that the true rule of law is that the officer has the right to amend his certificate of acknowledgment so long as he continues in office.[31]

Fort Worth, Tex. B. R. WEBB.

[23] 53 Mo. 252.
[24] 51 Mo. 170, and 57 Mo. 478.
[25] 10 Mo. App. 7.
[26] 78 Mo. 456.
[27] This is also held in Fitzgerald v. Milliken, 83 Ky. 70.
[28] 87 Tex. 49.
[29] 24 S. W. Rep. 697.
[30] McKellar v. Peck, 39 Tex. 381.

[31] In Tennessee the officer may, by virtue of the statute (Code 1884, sec. 2896), correct any mistakes or omissions in the certificate of acknowledgment on the application of either party by making oath in open court of the truth of such correction. The oath or note thereof need not be entered on the minutes of the court, and the correction may be made after the officer's term has expired. Grotenkemper v. Carver, 4 Lea, 375.

INDICTMENT—ALLEGATION OF INCORPORATION.

MATTOX v. STATE.

Supreme Court of Georgia, March 31, 1902.

Where, in an indictment for larceny, the ownership of the goods alleged to have been stolen is laid in a name which imports a corporation, the presumption is that it is the name of a corporation, and it is not necessary, even as against a special demurrer, to allege the fact of incorporation.

COBB, J.: The accused was charged with the offense of simple larceny; the indictment charging that he "did take and carry, with intent to steal the same, one bottle of beer, the personal goods of the Acme Brewing Company," of the value of 15 cents. A demurrer was filed, which set up that the indictment was defective for the reason that it did not set forth the ownership of the property alleged to have been stolen; that the term "Acme Brewing Company" was not the name of an individual, and that it did not import either a partnership or a corporation. The demurrer was overruled, and this is one of the errors assigned.

It is essential to the validity of an indictment for larceny that the goods alleged to have been stolen should be averred to be the property of some person or number of persons. If it is the property of an individual, the name of the individual should be stated. If it is the property of a partnership, the names of the persons composing the partnership should be set forth. If it is the property of a corporation, the name of the corporation should appear in the indictment. If in the indictment the name of the owner appears to be a partnership, the indictment would be defective unless the names of the individuals composing the partnership were set forth therein. See 12 Enc. Pl. & Prac. 937. If an indictment alleges the owner to be a corporation, it is not necessary to set forth the names of the members of the corporation. 3 Enc. Pl. & Prac. 759; Rap. Larceny, § 103; 2 Russ. Crimes (6th Ed.), p. 271. In the present case the indictment alleges that the owner of the

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property alleged to have been stolen was the Acme Brewing Company. This is not the name of an individual. The indictment does not show by allegation whether it is a corporation or a partnership. The name is of a character which is more appropriate to a corporation than a partnership, though partnerships are somtimes formed under names which would be appropriate to corporations. The name being one more peculiarly suited to a corporation than a partnership, the presumption would be that it was the name of a corporation. The name itself imports a business corporation. When the name of a party to a suit is such as to import that the party is a corporation, there is a presumption to this effect, and this presumption prevails until the contrary is made to appear. See Wilson v. Machine Co., 55 Ga. 672; Academy v. Hardin, 78 Ga. 39, 3 S. E. Rep. 305; Cribb v. Lumber Co., 82 Ga. 597, 9 S. E. Rep. 423. In the opinion in the Hardin case, *supra*, Clark, J., said: "Whether the name imports a corporation should, as a general rule, be left to judicial knowledge. If the name is manifestly religious, charitable, or educational, or other similar beneficence for the public good, the usual subjects of incorporations, it should import a corporation. If it is a financial, commercial, manufacturing name, or other kindred purpose, the usual subjects of incorporation, such a name should import a corporation. There is a difference between such names and those indicating partnerships, joint contractors, or other natural persons not the usual subjects of incorporations." In each of the other two cases cited above the name ended with the word "Company," and it was held that the name imported a corporation. The Acme Brewing Company cannot be an individnal. It must be, therefore, either a corporation or a partship. If it is a partnership, the indictment would be defective for the reason that the name of the partners were not set forth. If it is a corporation, the indictment would be good, notwithstanding the names of the members were not stated in the indictment. The term does not import a partnership, for it would be an unusual name for a partnership. It does import a corporation, for the reason that it is a name that would be ordinarily adopted by a corporation engaged in the character of business that the name indicates. As the name imports a corporation, the question is, is it necessary to allege in the indictment that it is a corporation to make the indictment valid? Whether it is so necessary is a question about which the authorities are not agreed. See 12 Enc. Pl. & Prac. 973; Hughes, Cr. Law & Proc. § 2737; Whart. Cr. Pl. (9th Ed.) § 110, note 5; 10 Enc. Pl. & Prac. 509, 510; Rap. Larceny, § 103. The following cases maintain the negative of the proposition just above stated: Fisher v. State, 40 N. J. Law, 169; State v. Grant, 104 N. Car. 908, 10 S. E. Rep. 554; State v. Fitzpatrick, 9 Houst. 388, 32 Atl. Rep. 1072; Stanly v. Railroad Co., 89 N. Car. 331; McLaughlin v. Com., 4 Rawle, 464; State v. Shields, 89 Mo. 259, 1 S. W. Rep. 336. In the following cases it was held that the fact of incorporation must be alleged: Wallace v. People, 63 Ill. 451; Cohen v. People, 5 Parker, Cr. R. 330; Pells v. State, 20 Fla. 774. In many of the cases cited above other cases will be found cited which bear on the question under discussion. In this state it has been held that the fact that the indictment did not allege the owner to be a corporation, when the name was of such a character as to indicate that it was, was not such a defect as would be good in arrest of judgment. Hatfield v. State, 76 Ga. 499; Berry v. State, 92 Ga. 47, 17 S. E. Rep. 1006. It has also been held: "Where an indictment charged a defendant with 'breaking and entering the depot of the Savannah Flordia & Western Railway, a corporation chartered by said state, doing business under said name,' the allegation that the owner was a corporation chartered by said state was mere surplusage, and need not be proved." Crawford v. State, 68 Ga. 822. The present case brings up for decision the question as to whether this omission would be such a defect as could be taken advantage of by special demurrer before arraignment. If the name imports a corporation, we see no good reason why the rule which has been applied in civil cases should not be made applicable in criminal cases, so that when a name is set forth in an indictment which imports a corporation rather than an individual or a partnership, there would be a presumption that it was the name of a corporation, and this presumption would prevail until the contrary was made to appear. Upon the face of the indictment the property alleged to have been stolen would be the property of a corporation, and the indictment would, therefore, not be defective for failing to allege that the owner was in fact a corporation, when the name imported that such was the case. It seems, however, from the authorities, that it would be necessary to prove the fact of incorporation, although it is not alleged in the indictment, though some courts hold this fact may be proved by evidence showing that the corporation was a *de facto* one, and that it is not necessary that the charter or articles of incorporation should be produced. See Smith v. State, 28 Ind. 321; Braithwaite v. State, 28 Neb. 832, 45 N. W. Rep. 247. No such questions as those just referred to are made in the present case, and hence it is not necessary to make any decision thereon. It would seem, however, that, if the name imported a corporation, and raised a presumption of corporate existence for purposes of pleading, it would also raise such a presumption for purposes of evidence, and that it would be incumbent upon the accused to prove affimatively that no such corporation existed.

Judgment affirmed.

NOTE.—*Necessity for Alleging Corporate Existence in an Indictment or Information.*—While we recognize that the weight of authority seems to be in favor of the position announced by the court in the principal case, we are inclined to repudiate the rule there announced as not sound on principle. The allegation of corpo-

rate existence may seem a small technicality, and in civil cases may well be dispensed with, but in criminal cases, where everything is presumed in favor of the accused, it cannot be said that the failure to allege corporate existence does not affect the substantial rights of the accused. One of the leading cases on this subject in this country,—Emmonds v. State, 87 Ala. 12, 6 South. Rep. 54,—states the rule with such clearness of expression and sound logic that we are constrained to refer to it somewhat at length. The indictment in this case was for burglary in breaking and entering the storehouse "of the Perry Mason Shoe Co." The court held that the indictment should either have alleged that said company was a corporation, or, if a partnership, must allege that fact, and state the names of the individual partners, showing that the defendant is not one of them. This being the only question before the court, the point was well considered. The court said in part: "One of the essentials of a charge in offenses against property is the negation of the defendant's ownership, by such averments as show affirmatively that the property, general or special, against which the crime is laid is in another. It is on this principle that indictments charging offenses against the property of partnerships are bad, unless the names of the individuals composing the firm are set out; for otherwise it is not shown that the crime could have been committed of the property, as *non constat*, but that the defendant is one of the partners, and as such is entitled to do, with respect to the partnership property, the precise thing charged against him as a crime. If the property is laid in a corporation it is not necessary to state the name of its shareholders, as they, in their individual capacities, have no more control or possession of it than strangers, and whether the defendant be a shareholder or not is immaterial. But the indictment should aver facts which show that the company is a corporation." Apparently the strongest argument put forth by the opinion in the principal case is the presumption of corporate existence which is supposed to arise from the mere allegation of a name which, in form, would seem to import a corporation. To this argument the court in the case we are considering advances the following: "The use of a name which may import a corporation, or which, on the other hand, may be that of a voluntary association or a simple partnership, will not suffice. It is enough in civil cases depending on corporate character, at least on appeal, to allege a name appropriate to a corporation; but the rule which requires indictments to aver every fact necessary to an affirmation of guilt is not satisfied so long as any one of these facts is left to implication or inference. The Perry Mason Shoe Company bears a name appropriate to corporate existence; yet it may be that of a voluntary association of two or more individuals, each having the right to break into and enter the storehouse of the company, and for aught that appears in the indictment the defendant may be one of these associates; so that if every fact set forth be admitted the court could not say that the defendants were guilty of the crime of burglary. These considerations lead us to the conclusion, which is supported by the weight of authority, that where property, against or in reference to which an offense is charged, belongs to a private corporation, the fact that the company is a corporation must be alleged."

The authorities are not agreed as to the right rule in such case. The weight of authority would seem to favor the rule announced in the principal case holding the allegation of corporate existence as unnecessary. Burke v. State, 34 Ohio St. 79; Jackson v. State, 76 Ga. 551; State v. Grant, 104 N. Car. 910; Braithwaite v. State, 28 Neb. 832; People v. Henry, 77 Cal. 445. Thus, in State v. Grant, *supra*, it was held that it was not necessary, in an indictment for larceny, where the articles charged to be stolen are alleged to be the property of a corporation, to aver in the bill the fact of the incorporation of the prosecutor, it being sufficient if the corporate name is correctly set forth. The argument of the court evidences an ignorance of the reason underlying the necessity for alleging corporate existence. The court seems to think the only purpose for such allegation is to identify the owner of the property stolen, and it rightly concludes that the corporate name, correctly set forth, is sufficient identification. This view completely overlooks the point that, in such case, on demurrer, the court could not say whether the owner of the property was a corporation or a partnership. It might be that the company adopting a corporate name was in reality a partnership, and that the accused was a member thereof, in which case he would not be guilty. In criminal prosecutions, at least, the facts should be alleged clearly, so that on the allegations in the indictments the guilt of the accused would be clear without the aid of the conjecture or inference. The cases of Braithwaite v. State, *supra*, and Burke v. State, *supra*, were under special statutes in force in Nebraska and Ohio, respectively, which provide that no indictment shall be deemed invalid "for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged, nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." In both these cases it was held that the corporate character of the company could be shown at the trial, and that the law was satisfied with proof that it was a corporation *de facto*. Many of the cases like the two just noticed, which are cited by the Am. & Eng. Encyclopedia of Law and by the court in the principal case, do not sustain the broad statement of the law which is laid down. Thus in Ball v. State, 48 Ark. 94, it was held that an indictment was not defective for failing to allege the incorporation of a school district because, according to the court, "every school district in the state is a corporation by statute, and it is never necessary in pleading to aver a legal conclusion."

A number of authorities often cited in support of the rule announced in the principal case do not relate to indictments for larceny or burglary, but to indictments for forgery of bank paper, in which case it is held not necessary on any ground to allege the incorporation of the bank. State v. Kiernan, 17 Nev. 229; State v. Pierce, 8 Iowa, 232; State v. Van Hart, 17 N. J. L. 327; State v. Weiler, 20 N. J. L. 321; People v. Ah Sam, 41 Cal. 645; People v. McDonnell, 80 Cal. 287. Thus in State v. Grant, *supra*, it was held that when a party is charged with forging an indorsement on the back of an order or draft purporting to have been drawn by one bank upon another, proof of the corporate existence of the bank is not required. The court said: "If the charge had been for forging an indorsement upon an order drawn by a company duly incorporated, then proof of the existence of the corporation would have been required." The reason for the rule is, according to opinion in the case of People v. Ah Sam, *supra*, that forgery of a bank bill would be equally an offense whether the company be actually incorporated or not, so it is acting as a corporation and issues bank bills which are current.

The rule making it necessary to allege the corporate existence of a company, if incorporated, especially in cases of larceny, burglary and fraud, is sustained by

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many respectable authorities. Emmonds v. State, 87 Ala. 12, 6 South. Rep. 54; People v. Swartz, 32 Cal. 160; People v. Bogart, 36 Cal. 245; White v. State, 24 Tex. App. 231, 5 S. W. Rep. 857, 5 Am. St. Rep. 879; Wallace v. People, 63 Ill. 451. Cohen v. People, 5 Parker, Cr. R. 330; Pells v. State, 20 Fla. 774; Thurmond v. State, 30 Tex. App. 539; State v. Mead, 27 Vt. 722; Nasets v. State, 36 Tex. Cr. Rep. 5, 32 S. W. Rep. 698. Thus in Nasets v. State, it was held that an indictment for defrauding the "First National Bank of G" is fatally defective unless it states whether such bank is an individual, a corporation, a co-partnership, or a joint stock company. This was undoubtedly the rule at common law and should be adhered to "until some better reason for its abrogation has been advanced than that offered by the cases which have refused to recognize it. ALEXANDER H. ROBBINS.

JETSAM AND FLOTSAM.

LIMITATION OF HOURS OF LABOR IN BAKERIES.

In the opinion of the Appellate Division of the New York Supreme Court, in People, etc., v. Lochner, it is held (McLennan and Williams, JJ., dissenting) that section 110 of article of 8 the New York Labor Law (ch. 415, Laws 1897) is not unconstitutional. The provision in question is as follows: "No employee shall be required or permitted to work in a buscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter workday on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work." From the fact that the decision is by a bare majority of the court, the question involved would seem to be a close one. Recognizing that much is to be said in support of the position of the dissenting judges, that the statute unwarrantably impairs liberty of contract, we nevertheless believe that, according to the present prevailing conception of the police power of a state, the action of the majority of the court is correct.

The legislature of several states have assumed to prescribe what is known as the "eight-hour day" as a general standard of the period of diurnal work of male adult citizens. In Tiedeman's treatise on "State and Federal Control of Persons and Property" (sec. 102) occurs the following language: "In those states in which the statutes simply prescribe what shall c nstitute a day's work, in the absence of an agreement otherwise, it is undoubtedly the right of the employee to demand extra wages for the overtime work, unless there has been an express or implied contract between the parties for a longer day's work. Batchelder v. Bickford, 62 Me. 523. But where the established custom in the particular trade or occupation is to work for a longer time per day than the statutory period, the employee is presumed to know of such usage and custom, and he cannot demand extra compensation for the overtime, in the absence of an express contract for the same. Luske v. Hotchkiss, 37 Conn. 219; Bartlett v. Street Ry., 82 Mich. 658; Schnurr v. Savigny, 85 Mich. 144; Helphenstine v. Hartig, 5 Ind. App. 172; Grisell v. Noel Bros. Flour Feed Co., 9 Ind. App. 251. Some of the cases, however, hold in construing these statutes that no extra compensation can be demanded for overtime work unless it has been stipulated for in the contract of hiring. McCarthy v. Mayor of N. Y., 96 N. Y. 1; Luske v. Hotchkiss, 37 Conn. 219."

The New York statute at present under consideration, which expressly prohibits more than ten hours of labor, would seem to be referable to a more definite function of the police power. Sunday laws have been generally upheld as direct "health laws," as "there is no other cause, equally common and general, of impaired health, broken down constitutions and shortened lives, than excessive, and hence exhaustive, labor; it matters not whether the occupation is wholesome or unwholesome." While courts might have difficulty in holding an absolutely prohibitory eight-hour law constitutional, a ten-hour law would present a different situation. The judgment of the legislature in such matters is of course presumptively to be effectuated. While a small arbitrary limit of hours of labor might seem unwarrantably to interfere with liberty of contract, the larger the limit prescribed the greater will be the disposition of the courts to recognize the same upon the same considerations that uphold Sunday laws. Moreover, as the majority of the appellate division pointed out, the present law probably must be sustained as a regulation of an employment of an exceptional character in which the requirement of long hours of work will be hygienically detrimental both to the workers themselves and to the public. The cases cited in the opinion of the court which come closest to the present controversy are Holden v. Hardy, 169 U. S. 361, which sustained a Utah statute limiting the hours of labor in underground mines and smelting works, and People v. Fife, 136 N. Y. 554, which decided that "the legislature might prohibit railroads from permitting or requiring workmen, who have worked twenty-four hours, to go on duty again until they have had eight hours' rest." In the opinion of Justice Davy it is shown that section 110, immediately under review, is part of a general scheme of regulation of bakeries and that the other sections, covering, drainage, plumbing, rooms, furniture, utensils, wash rooms, closets, sleeping places, etc., obviously and unmistakably are health provisions. The inference that the legislature intended section 110, limiting hours of labor, also as a provision for the public health may be derived from its textual association, and the following language from the opinion of the court shows that such inference is practically not unjustifiable. "These establishments are compelled to do baking during the nighttime in order to supply their customers in the morning. It is necessary for them to have their ovens heated day and night, and their employees are required to work more hours each day than men usually work who are engaged in other kinds of business. When we consider the intense heat of the rooms where baking is done, and the flour that floats in the air and is breathed by those who work in bakeries, there can be but little doubt that prolonged labor day and night, subject to those conditions, might produce a diseased condition of the human system, so that the employees would not be capable of doing their work well and supplying the public with wholesome food.

The legislature no doubt recognized the fact that proprietors of these establishments desire to obtain as much labor as possible from their employees, who, from fear of being discharged, are often induced to comply with the employer's request to work during both night and day, and the legislature evidently reached the conclusion that more than ten hours labor each day might be injurious to the health of the employees.'—*New York Law Journal.*

CORRESPONDENCE.

RIGHT OF INSANE PERSONS TO NOTICE BEFORE ADJUDICATION OF INSANITY.

To the Editor of the Central Law Journal:

In your issue of July 4, 1902 (Central Law Journal No. 1, Vol. 55), in an article on "Insane Persons—Right to Notice before Adjudication of Insanity," in your "Notes of Important Decisions," you cite and comment upon the case of Jones v. Learned, 66 Pac. Rep. 1071; and, among other things, say:

"In this case the Supreme Court of Colorado (Court of Appeals) held that although the statute providing for the inquisition of persons alleged to be insane did not in terms require notice to be served on the lunatic, that, nevertheless, such a notice would be implied and is indispensable irrespective of statute. We cannot find words to express our abhorrence and amazement at even the suggestion of a different rule."

I think it but fair to the courts of this state, as well as to you and the readers of your valuable journal, that your attention be called to the facts as they are found in the statement of the case. From the statement it appears that one Learned, who had been adjudged a lunatic in New York, and who was confined in a lunatic asylum in Connecticut, had property in this state, to preserve which property the county court of this state appointed a conservator without notice. A motion was made in the county court to remove the conservator so appointed, and appoint as conservator one Chapin of Connecticut who was Learned's conservator in Connecticut. This the county court here refused to do. An appeal was taken to our district court, which reversed the county court, which ruling of the district court was affirmed by our court of appeals in 66 Pac. Rep. 1071.

It therefore appears that the original order of the county court did not attempt without notice to adjudge Mr. Learned a lunatic, but was made solely for the preservation of his property, he, at the time, being an adjudged lunatic and in confinement in an asylum. While this ruling of our county court was reversed, we think the facts pointed out show that our county court's ruling does not call for the criticism of the writer of your article.

Denver, Colo. C. J. BLAKENEY.

BOOK REVIEWS.

NEWELL ON REAL PROPERTY.

A clear and concise statement of the law of real property for the use of students has been one of the great needs in legal text-book literature. Of course, from the practitioner's standpoint, no book could much improve upon the work of Mr. Washburn on this subject, but it is a fact fully acknowledged at this time that it is practically impossible to publish a legal text book which will meet the needs of the student and practitioner alike. A treatise for the practitioner must be analytical, splitting up general rules into their special applications and treating all the cases in detail. The student's text book, on the other hand, must be synthetical, building from the most important authorities those general rules that lay at the foundation of the particular subject treated. In such a book to treat all the cases in detail would defeat its purpose and confuse the student. This condition is securing rapid recognition by law publishers as evidenced by the publication of student's text books on the principle just outlined. A good illustration of this new movement in law-book making is to be found in the volume just published entitled, "Elements of the Law of Real Property" by Grant Newell. One thing of special importance can be said of this book,—it presents in remarkable clearness and simplicity what is undoubtedly the most difficult branch of the law. More than this, the book is interesting! That statement is enough to commend the book to any student who has experienced such strong feelings of apprehension, doubt and uncertainty as he dragged his weary way through Blackstone or any of the great text books on this subject. Here the dry bones of the law put on flesh and dwell among us; here the desert of unimpassioned logic which supports this part of the law's superstructure begins to blossom as the rose under the skillful influence of one who possesses in a remarkable degree the rare gift of teaching. We heartily commend this book to law schools, legal instructors and students of the law generally. Printed in one volume of 438 pages, and published by T. H. Flood & Co., Chicago, Ill.

SMITH'S STUDIES IN JURIDICAL LAW.

The principles of law seem to be less favored among practicing lawyers than their application thereof in individual cases. That this tendency is a most unfortunate and tends to lower the standard of the profession is recognized by great jurists everywhere. Any man of only moderate intellectual attainments can be a pettifogger, but no man can rise to any great eminence as a lawyer without a thorough knowledge of the principles of law. He may be a man of acute business intellect and thus be able to succeed financially in what may be termed the commercial branch of the law. However, nothing more can be said of that man but that he is a shrewd business man; he can never be a great lawyer or jurist, in the real sense of that term. To meet this tendency toward commercialism in the law and to tempt the appetite of lawyers for something better than the quibbles and technicalities of the law, is undoubtedly one of the reasons for the publication of the treatise, entitled "Studies in Juridical Law," by Horace E. Smith, LL. D. The scope of this book will broaden any lawyer's horizon. It starts with an attempt to define and explain just what is meant by the term municipal or "juridical" law. Then the author plunges into a discussion of the origin of government and law, giving the various theories and schools from the Hebrew theocracy to the social compact theory. From this starting point further back from which it would have been difficult for our author to have gone, he proceeds to explain to us the relations between the government and its subjects, which leads him into a long discussion of what may be termed the fundamental principles of the law. The discussion unfolds under four heads: 1st, the duties and obligations of subjects to the government; 2d, the duties and obligations of the government to its subjects; 3d, the duties and obligations of the subjects to one another; 4th, the modes of enforcement of these duties and obligations. Chapter IV. treats of the subject of written laws, and chapter V. with the unwritten or common law. The following six chapters treat of the six principal subdivisions of juridical law: Criminal law, military and martial law, equity jurisprudence, admiralty and maritime law, international law, and the law-merchant. Then follows a discussion of various interesting subjects in the law, as, for instance, the Mosaic Code, the feudal system, the Roman or civil law, and Anglo-Saxon institutions and customs. Printed in one volume of 359 pages, and published by T. H. Flood & Co., Chicago, Ill.

HUMORS OF THE LAW.

Jones is always appearing with legal stunts. Last week he came in with this: "Got a mighty funny case upstairs. Insured had store teeth. Put them in a

hip pocket. Forgot they were there. Sat down in a street car. Teeth bit him. He died of hydrophobia, and now the insurance company claims it is a case of sui cide and wont pay."

The following advertisement was inserted in a large city daily by one of the most prominent lawyers of Texas: Law Books for sale—2000 volumes latest text books and reports for sale or exchange for sows. These books are A1 authority in all states and countries except Texas, and good for waste paper in Texas. Even the "big" lawyers take a beating very sorely sometimes.

Not long ago a prominent country lawyer, becoming netted at the rulings of the court, picked up his hat and started to walk out of the court room. He was halted by the court with the inquiry:

"Are you trying to express your contempt for the court?"

"No, your Honor," was the reply, "I am trying to conceal it."

Mr. Justice Joyce, as vacation judge, has given practical illustration of his value of time, and shown how many matters may be got over with great rapidity. The *Globe* gives an instance of his talents in this direction when he was at the bar. He was counsel in a case, the weather was hot, and it was approaching the time for the court to rise. Mr. Joyce, at the close of his opponent's speech, rose from his seat, looked at the clock, bowed to the judge, and sat down again. The judge, overcome with the consideration of counsel, instantly gave judgment in his favor.

Mr. Ben Hardin tells a good story about an old darky who was the prosecuting witness in a case against another gentleman of color for stealing chickens, when Mr. Hardin was prosecuting attorney down in one of the central counties of this state. The defendant was represented by a very able and prominent local attorney who questioned the witness thus: "Now, Mose, do you say you know this defendant stole your chickens?" "Yes, sah." "Couldn't you be mistaken?" "No, sah, don't think ah could." "Why are you so certain?" "Cause they was black Spanish chickens; didn't nobody around heah, but me, have no black Spanish chickens and now Lige Smith has got 'em." "But," said the attorney, "suppose I should tell you that I have a half a dozen black Spanish chickens running around in my back yard. What would you say then?" "What would ah say," "Yes, sir, what would you say to that?" "Well, sah, ah think ah'd say dat Lige Smith had done paid yo' fee wif mah chickens."—*Kansas City Bar Monthly.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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3. ACTION - Illegal Contract.—Where a party to an illegal contract received profits from its execution, he will not be compelled to account to the other party.—Alexander v. Barker, Kan., 67 Pac. Rep. 829.

4. APPEAL AND ERROR - Assignment of Error.—Rulings of a trial court which were not assigned as error in the appellate court will not be considered by the supreme court —City of Dallas Consol. Electric St. Ry. Co., Tex., 66 S. W. Rep 835.

5. APPEAL AND ERROR Bill of Exceptions —Under Code Civ. Proc. § 1736, a bill of exceptions used on motion for new trial may be used on appeal from the judgment, though no appeal is taken from the order denying the motion.—Whalen v. Harrison, Mont., 67 Pac. Rep. 934.

6. APPEAL AND ERROR—Bond for Appeal.—Under 2 Ballinger's Ann. Codes & St. § 6509, an attorney at law of the state may be a surety on an appeal bond.—Murray v. Moynahan, Wash., 67 Pac. Rep. 810.

7. APPEAL AND ERROR—Failure to Assign Error.—Where the refusal to allow an amendment to a bill in equity for the purpose of rendering certain evidence admissible is not assigned as error, it will be considered on appeal.—Branschied v. Branschied, Wash., 67 Pac. Rep. 812.

8. APPEAL AND ERROR — Improper Party.—Permitting an improper and unnecessary party to intervene in an action on a note held prejudicial error.—Wilson v. Tyler Coffin Co., Tex , 66 S. W. Rep. 865.

9. APPEAL AND ERROR—Injunction.—Dissolution of temporary injunction held not assignable as error after decree adverse to appellant and failure to file *supersedeas* bond.—Brumley v. Boyd, Tex., 66 S. W. Rep. 874.

10. APPEAL AND ERROR—Jurisdiction.—Where the record in a suit to restrain the appropriation of water failed to show that the value of the water of which the proprietor was deprived by the decree exceeded $100, and there was no certificate that title to real estate was involved, the supreme court has no jurisdiction, under Gen. St. 1901, § 5019.—Grant v. Robb, Kan , 67 Pac. Rep. 852.

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12. APPEAL AND ERROR—Laches. The exercise of a trial court's discretion in allowing a claim to funds in litigation alleged to be barred by laches will not be disturbed on appeal.—Willard v. Bullen, Oreg., 67 Pac. Rep. 924.

13. ASSIGNMENTS—Special Fund.—An order upon a special fund operates as an equitable assignment, entitling the holder to payment out of the fund to the exclusion of general creditors of the drawer.—Willard v. Bullen, Oreg., 67 Pac. Rep 924.

14. ATTORNEY AND CLIENT—Money Fraudulently Obtained. Equity has jurisdiction of a suit by client against his attorney to decree a trust in favor of the client as to money fraudulently obtained from the client

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15. ATTORNEY AND CLIENT—Quantum Meruit.—An action for services on *quantum meruit* cannot be maintained, where the employment was on condition that the amount was to be fixed by defendant, and he has neither refused to do so nor repudiated the contract.—Roche v. Baldwin, Cal., 67 Pac Rep. 903.

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17. BANKS AND BANKING—Saving Banks.—A finding in an action against a savings bank by a creditor thereof held sufficient to raise the presumption on appeal that the liability was one which the bank could legally incur. – Laidlaw v. Pacific Bank, Cal., 67 Pac. Rep. 897.

18. BILLS AND NOTES - Evidence.—The maker of a note cannot contradict his promise to pay by showing an agreement before execution that it would be surrendered to him.—Bomar v. Rosser, Ala., 31 South. Rep. 430.

19. BILLS AND NOTES—Invalid Note Not a Bar to Subsequent Suit.—A judgment on a note given for a patent, holding the note invalid as a violation of Sand. & H. Dig. § 493, held not a bar to a subsequent suit against the maker for a balance due for the price of the patent.—Roth v. Merchants' & Planters' Bank, Ark., 66 S. W. Rep. 918.

20. BONDS - Assignment.—Mortgagor held not estopped from pleading against an assignee of the bonds any defense which she had and might have used against mortgagee before notice of the assignment.—Murray v. Duffy, Ky., 66 S. W. Rep. 1038.

21. BONDS—Misappropriation of Funds.—Where a bond is given by a corporate officer, the burden was on a surety to show that moneys which came into the officer's hands before the execution of the bond had been misappropriated before such time.—McMullen v. Winfield Building & Loan Assn., Kan., 67 Pac. Rep. 892.

22. CARRIERS—Authority of Agent. - Though the agent has no authority to make the contract for delivery of freight at a certain point, the carrier, having undertaken to carry it out, held liable for loss from negligent performance. Nashville, C. & St. L. R. Co. v. Smith, Ala., 31 South. Rep. 481.

23. CARRIERS — Bill of Lading.—A stipulation, in a bill of lading issued by a carrier, that its liability should be limited to the value stated therein, is void as against public policy, in case the value so stated is greatly below the true value, whether the carrier was informed of the true value or not.—Southern Ry. Co. v. Jones, Ala., 31 South. Rep. 501.

24. CARRIERS—Damages. Partly delayed on his way to a certain point by reason of non-continuance and change in route of trains and wrong directions of railroad agents held entitled to only actual damages suffered. Illinois Cent R. Co. v. Pearson, Miss., 31 South. Rep. 435

25. CARRIERS—Evidence.—In an action against a railway company for injuries sustained by alighting from a train, it was not error to reject evidence that there were no lights at the station, failure to provide lights not being pleaded.—Milligan v. Texas & N. O. R. Co., Tex , 66 S. W. Rep. 896.

26. CARRIERS Gratuitous Carriage.—Where one who was permitted to ride on a freight train as a mere matter of accommodation was thrown while leaving it as it moved rapidly, the railroad company held not liable for his death resulting therefrom. Peak's Admr. v. Louisville & N. R. Co., Ky., 66 S. W. Rep. 995.

27. CARRIERS — Instructions —In an action against a railway company for injuries to a passenger, requested instructions assuming that it was negligence for a passenger to stand on the platform of a moving train and violate a rule of the company were incorrect.—St. Louis S. W. Ry. Co. of Texas v. Ball, Tex , 66 S. W. Rep. 879.

28. CARRIERS—Negligence.—A charge that it is not negligence as a matter of law for a passenger to attempt to board a street car in slow motion held improper —Birmingham Ry. & Electric Co. v. Brannon, Ala., 31 South. Rep. 523.

29. CARRIERS—Negligence.—A railroad company held not negligent as a matter of law in failing to announce on its trains their arrival at stations —Houston & T. C. Ry. Co. v. Goodyear, Tex., 66 S. W. Rep. 862.

30. CHATTEL MORTGAGES—Recording.—Under Gen. St. § 4244, where a mortgagor of personalty is a resident of the state, the mortgagee can deposit his mortgage either in the office of the register of deeds in the county where the property is situated or that in which the mortgagor resides.—Third Nat. Bank v Bond, Kan., 67 Pac. Rep. 818.

31. CHATTEL MORTGAGES—Removal of Property from State. - A mortgagee's lien on personalty follows the mortgaged property into another state, to which it is removed without his knowledge or consent.—Blythe v. Crump, Tex., 66 S. W. Rep. 885.

32. CLERKS OF COURTS—Surety on Official Bond.— The surety on the official bond of a register in chancery, who has furnished him money which he has paid but in his official capacity, held not entitled to claim that the money was paid by him as surety.— Mitchell v. Rice, Ala., 31 South. Rep. 498.

33. CONSTITUTIONAL LAW — Monopolies. — Ky. St. § 3915, providing for the punishment of any person who shall combine with others to raise the price of any article, held not in violation of Const. § 198, relating to unlawful combinations. — Commonwealth v. Bavarian Brewing Co., Ky., 66 S. W. Rep. 1016.

34. CONTRACT—Agency —A contract of agency, invalid by statute where made, is non-enforceable, though the suit to enforce it is a transitory one.—Alexander v. Barker, Kan., 67 Pac. Rep. 829.

35. CONTRACT Competition Bidders.— An agreement between competitive bidders for a school building considered, and held to be void as against public policy.—Whalen v Harrison, MONT., 67 Pac. Rep 984.

36. CORPORATIONS—Action on Note.—Burden of proof held to be upon plaintiff, in an action upon a note signed on behalf of a corporation by the president thereof, to show that the corporation had assumed the payment of the note. — Wilson v. Tyler Coffin Co., Tex., 66 S. W. Rep. 865.

37. CORPORATIONS — Contribution. — Stockholders guarantying payment of the notes of the corporation and paying the judgments obtained thereon can maintain contribution against their co-stockholders.—Hinshaw v. Austin, Kan., 67 Pac. Rep. 882.

38. CORPORATIONS—Ultra Vires.—The burden of proving that a contract of a corporation is *ultra vires* is on the one impeaching its validity. — Allen v. West Point Min. & Mfg. Co., Ala., 31 South. Rep. 462.

39. COSTS—Immaterial Parts of the Record. — Under Civ. Code Prac. § 737, appellant corporation having brought up the entire record of the settlement of an estate, embracing irrelevant litigations, it will be required to pay for the immaterial parts of the record.—Forest Hill Building & Loan Assn. v. McEvoy's Exr., Ky., 66 S. W. Rep. 1031.

40. COURTS Certification to Supreme Court. — Under Const. § 6, amendment of 1884, a case cannot be certified by the court of appeals to the supreme court, when only a single point therein is decided, but only after a decision of the case.—Gipson v. Powell, Mo., 66 S. W. Rep. 969.

41. COURTS - Quieting Title.—Where, in a suit to quiet title, the court finds the title in plaintiffs, but decrees a lien for taxes paid by defendant, the validity of which lien is the question on appeal, the cause will be transferred to the appellate court. — Rowe v. Currant River Land and Cattle Co., Mo , 66 S. W. Rep. 928.

42. CREDITORS' SUIT — Debt of Another. — An action seeking to charge defendant with a debt of another,

where it is not charged that he has any property belonging to such other or is concealing any such property, is not a creditors' bill. — Houghton v. Axelsson, Kan., 67 Pac. Rep. 825.

43. CRIMINAL LAW Failure to Object. - So far as Code 1892, § 4370, provides that failure of the record in a criminal case to show jurisdictibnal facts is not ground for reversal, in the absence of objection below, it exceeds the power of the legislature. — Arbuckle v. State, Miss., 31 South. Rep. 437.

44. CRIMINAL LAW — Jury. — That additional jurors were necessary in a criminal case, the jury box was empty, held not to authorize the court, under Civ. Code, § 273, to order the sheriff to summon talesmen, without a further showing that a jury box could not at the time be legally filled, or a jury could not in some manner be obtained. - State v. Edwards, Kan., 67 Pac. Rep. 834.

45. CRIMINAL LAW – Lieutenant Governor. - Objection that lieutenant governor was incompetent to appear as prosecuting attorney held untenable. — State v. Hawkins, Wash., 67 Pac. Rep 814.

46. CRIMINAL LAW — Motive. — Where defendant attempted to show by a witness that there was no motive for his shooting the witness' daughter, on the ground that good feeling existed between all the parties, it was competent for the state to show that differences did exist. Baines v. State, Tex., 66 S. W. Rep. 847.

47. DAMAGES Amount.—In an action for injury to a horse and vehicle, held not error to permit proof of the amount of repairs to the vehicle and harness, without proving that such amount was reasonable. — Chaperon v. Portland General Electric Co , Oreg., 67 Pac. Rep. 928.

48. DAMAGES—Evidence. — In an action for personal injuries, it is error to allow plaintiff to show that he has a wife and children.—Kansas City, Ft. S. & M. R. Co. v. Eagan, Kan., 67 Pac. Rep. 887.

49. DAMAGES—Proximate Cause. — Rebreaking of the limb of plaintiff in a personal injury action held not cause by his own negligence, but the proximate result of the original injury. Postal Tel. Cable Co. v. Hulsey, Ala., 31 South. Rep. 527.

50. DEEDS—Life Estate. - A conveyance of real estate, otherwise legal, is not void because subject to a life estate in the grantor, the payment of his debts, expenses of his last illness, and certain bequests. — Powers v. Scharling, Kan , 67 Pac. Rep. 820.

51. DEEDS — Mortgage Debt. — A deed to mortgaged property, executed by the mortgagors to the owner of the mortgage in full settlement of the mortgage debt, held valid, although the note and mortgage were not returned to the mortgagors until two years after the execution of the deed. Snyder v. Nichols, Kan., 67 Pac. Rep. 896.

52. DEPOSITIONS — Motion to Suppress.—The proper manner of objecting to the failure of a witness to answer cross-interrogatories in a deposition is by a motion to suppress the entire deposition before entering on the trial. — Electric Lighting Co. of Mobile v. Rust, Ala., 31 South. Rep. 486.

53. DISMISSAL AND NONSUIT — Service.—An action will not be dismissed, on motion of defendant, because there was no service of summons on him within 60 days from the filing of a petition. — Green v. McCracken, Kan., 67 Pac. Rep. 857.

54. DIVORCE Evidence. — Evidence of acts of cruelty are inadmissible in support of a bill for divorce, unless the acts constituting the cruelty complained of are specifically alleged in the bill.— Branscheid v. Branschied, Wash., 67 Pac. Rep. 812.

55. DIVORCE –Voluntary Abandonment.— Code, § 1492, providing for three years' residence of complainant before filing a bill for divorce for voluntary abandonment, held not affected by sections 1485 and 1492. — Davis v. Davis, Ala., 31 South. Rep. 473.

56. EJECTMENT – Adverse Possession. – An amendment in a grantee's statutory action against an adverse possessor, making the grantors plaintiffs for the use of the grantee, held improperly allowed. — Reese v. Reaves, Ala., 31 South. Rep. 447.

57. EMINENT DOMAIN—Condemnation of Land.—Under Const. art. 14, § 7, and Code §§ 1719-1721, relating to proceedings for condemnation of land, the bond on appeal from the probate court, held not to entitle the applicant to enter the land pending appeal. – Southern Ry. Co. v. Birmingham, S. & N. O. Ry. Co., Ala., 31 South. Rep. 509.

58. EQUITY - Construction of Will. - Equity will, as incident to suit to compel issue by a bank of new certificates of stock, construe will as to complainant's power to dispose of the stock. — Evins v. Cawthon, Ala., 31 South. Rep. 441.

59. ESTOPPEL — Husband and Wife. — Wife held not estopped to assert land was hers by joining in mortgage thereof purporting to be her husband's for express purpose of relinquishing dower.—Gibson v. Clark, Ala., 31 South. Rep. 472.

60. EVIDENCE—Attachment. — Creditors of a debtor, whose property was sold on execution in attachment suits to which they were not parties, held to have right to maintain suit to set aside mortgage by debtor as fraudulent, and to hold the sheriff and plaintiffs in attachment liable for violation of process. — Brock v. Berry, Ala., 31 South. Rep. 517.

61. EVIDENCE - Bill of Review. — To support a bill of review for error of law apparent, it must appear, on a comparison of the decree with the pleadings, etc., that the court has reached an erroneous conclusion of law, and irregularities in the proceedings or errors in deductions from the evidence cannot be considered. — Jordan v. Hardie, Ala., 31 South. Rep. 504.

62. EVIDENCE— Improper Acknowledgment. — Under Code 1896, § 1797, the grantor of a deed which is improperly acknowledged may prove its execution by testifying to his own signature and that of attesting witness, and it is error to refuse to allow him to testify as to his own signature before he has offered to prove the signature of the witness. — Hayes v. Banks, Ala., 31 South. Rep. 464.

63. EVIDENCE—Judicial Notice.— Courts take judicial notice of the charter of a city. — Arndt v. City of Cullman, Ala , 31 South. Rep. 478.

64. EVIDENCE – Notice to Produce a Book. — Plaintiff, having given notice to defendant to produce a notice which plaintiff sent him, may, on production of one claimed by defendant to be such notice, deny it and introduce copy of the one he claims he sent. — Barnett v. Willson, Ala., 31 South. Rep. 521.

65. EXCEPTIONS, BILL OF — Appeal. — Under practice rule (Code, p. 1200), an agreement of the parties to an appeal purporting to extend the time for signing a bill of exceptions beyond the beginning of the term of court next succeeding that at which trial was had is unvailing.—Cooley v. United States Savings & Loan Co., Ala., 31 South. Rep. 521.

66. EXCEPTIONS, BILL OF Signed Out of Term Time.— On an appeal from a judgment against one defendant, a bill of exceptions signed out of term time under an order extending the time for signing a bill on granting a new trial to the other defendant will not be considered. —Henry v. Couch, Ala., 31 South. Rep. 463.

67. EXECUTION—Ejectment.—Ejectment is the remedy of a purchaser at sheriff's sale of land which the debtor has fraudulently conveyed. - Gunn v. Hardy, Ala., 31 South. Rep 443.

68. EXECUTION - Personal Property — Personal property should not be sold on execution in mass, where the articles can be sold separately at greater advantage.— Brock v. Berry, Ala., 31 South. Rep. 517.

69. EXECUTORS AND ADMINISTRATORS—Claim Against Estate. - Knowledge of personal representatives of deceased of a claim against the estate does not dispense

with presentment thereof.—Borum v. Bell, Ala., 31 South. Rep. 454.

70. EXECUTORS AND ADMINISTRATORS—Claim Against Railway.—An administratrix who compromised and settled a claim against a railway by collusion with an employee of the company held guilty of malfeasance, justifying her amotion.—Bozeman v. May, Ala., 31 South. Rep. 491.

71. EXECUTORS AND ADMINISTRATORS Commissions.—A judgment of a probate court allowing commissions to executors will not be disturbed on appeal, in the absence of a showing that such allowance was unreasonably great or small.—Noble v. Jackson, Ala., 31 South. Rep. 450.

72. EXECUTORS AND ADMINISTRATORS—Money Had and Received. A complaint in an action against an administrator as such for money had and received for plaintiff's use does not authorize a recovery against him either in his representative or individual capacity.—Spotswood v. Bentley, Ala., 31 South. Rep. 445.

73. EXECUTORS AND ADMINISTRATORS Payment and Satisfaction.—Where an executor of a will, who is also a creditor, receives and disposes of assets and dies before accounting, the doctrine of payment and satisfaction of his debt by retainer does not apply, unless the value of the property so received equaled the amount of the debt. Jordan v. Hardie, Ala., 31 South. Rep. 504.

74. EXECUTORS AND ADMINISTRATORS—Probate Jurisdiction.—Under Code § 45, probate court of one county, on determining that testatrix died an inhabitant thereof and that paper propounded for probate was her last will, has exclusive jurisdiction to issue letters testamentary.—McDonnell v. Farrow, Ala., 31 South. Rep. 475.

75. FRAUDULENT CONVEYANCES - Evidence.—In action to set aside execution sale as fraudulent toward creditors, exclusion of corrobrative evidence of judgment debtor's fraudulent intent held harmless error.—H. B. Claflin Co. v. Lass, Colo., 67 Pac. Rep. 910.

76. HIGHWAYS—Negligence —Where a town was substituting a new bridge for an old one, and had placed warnings in the highway, as the warnings were such as to easily escape the attention of travelers, the question whether they were sufficient was properly submitted to the jury.—Wetmore Tp. v. Chamberlain, Kan., 67 Pac. Rep. 845.

77. HOMESTEAD - Execution.—New homestead held to have been acquired with proceeds of old, and therefore exempt from execution under Rev. St. 1899, § 3628. Rose v. Smith, Mo., 66 S. W. Rep. 940.

78. HOMESTEAD—Mortgage.—A mortgage on a homestead, given by a husband and wife to secure the husband's note, held enforceable against the homestead.—Skinner v. Moore, Kan., 67 Pac. Rep. 827.

79. HUSBAND AND WIFE—Public Policy.—A contract by a husband and wife held against public policy, and not to sustain a claim of ownership in the wife of a crop grown by the husband as against his creditors.—Dempster Mill Mfg. Co. v. Bundy, Kan., 67 Pac. Rep. 816.

80. INDICTMENT AND INFORMATION - Leave of Court.—Under Pen. Code, §§ 1730-1732, no leave of court is necessary to file an information after commitment on preliminary examination, and a writ of supervisory control will not issue to compel the granting of lease.—State v. Second Judicial Dist. Ct of Silver Bow County, Mont., 67 Pac Rep. 943.

81. INSANE PERSONS Necessaries.—A claim may be had against the estate of an adult for necessaries furnished him, though he was of unsound mind.—Borum v. Bell, Ala., 31 South. Rep. 454.

82. INSURANCE Payment to Wife.—Where the company in good faith paid life policy to the husband of insured, such payment held a complete defense in an action by the administrator on the policy.—Metropolitan Life Ins. Co v. O'Farrell, Kan., 67 Pac. Rep. 835.

83. INSURANCE - Total Loss.—The phrase "total loss" only means such destruction as deprived the property of the character in which it was insured.—Liverpool & L. & G. Ins. Co. v. Heckman, Kan., 67 Pac. Rep. 879.

84. INTEREST Bills and Notes —A provision in a note requiring an increased rate of interest after maturity, but less than the maximum rate of interest authorized by contract under Hill's Ann. Laws, § 3587, held valid as an agreement for liquidated damages, notwithstanding Hill's Ann. Laws, § 3587, as amended by Laws 1898, p. 15.—Close v. Riddle, Oreg., 67 Pac. Rep 932.

85. INTERNAL REVENUE - War Tax-Stamps. — An express company, required under the war revenue act to affix stamps to express packages, may refuse to accept a package unless the consignor pays for or furnishes a stamp in addition to the regular rates.—People v. Wells, Fargo & Co., Cal., 67 Pac. Rep. 895.

86. INTOXICATING LIQUORS—Defective Information.—An information charging maintenance of liquor nuisance, and alleging that at a time in the past defendant kept a place where liquors "are sold," is bad. State v. Chiles, Kan., 67 Pac. Rep. 884.

87. INTOXICATING LIQUORS—Illegal Sale.—The fact that an insane person's estate received the benefit of a purchase of whisky by such insane person by a resale thereof and the appropriation of the proceeds does no make the purchase contract valid.—Kelly v. Burke, Ala 31 South. Rep. 512.

88. JUDGES—Appointees of Governor.—Laws 1901, ch. 176, providing that an interim between the terms of the then incumbents of certain judicial officers and the beginning of the terms of their regularly elected successors shall be filled by appointees of the governor, is within the legislative power.—State v. Andrews, Kan. 67 Pac. Rep. 870.

89. JUDGMENT—Assignment.—A judgment that an assignor for the benefit of creditors had no vendible interest in land which passed under the assignment does not estop his heirs from claiming the land subject to a trust imposed by the will under which it was held.—Goatley v. Crowe, Ky., 63 S. W. Rep 1029.

90. JUDGMENT—Collusion of Parties. The defense, in action on a judgment, that the judgment was obtained by collusion of plaintiffs with defendant's attorney, cannot be made, being a collateral attack on the judgment.—Harter v. Shull, Colo., 67 Pac. Rep. 911.

91. JUDGMENT—Death of Respondent.—Where one of the parties respondent to a bill in equity died on the same day, but before, the decree was rendered, the decree was void.—*Ex parte* Massie, Ala., 31 South. Rep. 483.

92. JUDGMENT - Fraudulent Conveyance.—In an action by a judgment creditor to set aside an alleged fraudulently conveyance, the burden is on defendants to show fraud practiced by plaintiff in obtaining his judgment.—Johnson v. Stebbins-Thompson Realty Co., Mo., 66 S. W. Rep. 933.

93. JUDGMENT—Homestead.—A judgment denying a debtor's right to the homestead exemption held binding on the wife of the debtor, though she was not a party to the proceeding.—Frazier v. Brashers, Ky., 66 S. W. Rep. 1038.

94 JUDGMENT Original Bill.—A bill seeking the ascertainment and enforcement of complainant's interest in the official bond of a register in chancery, the vacating of decretal orders fraudulently obtained by the register, and subrogation to his rights in securities is not a bill of review, but an original bill. Mitchell v. Rice, Ala., 31 South. Rep 498.

95. JUDGMENT—Tax Deed —Where defendant in ejectment claims under a tax deed and a decree quieting title under such tax deed in an action to which plaintiff was a party, the invalidity of the tax deed is immaterial, unless the decree quieting title is absolutely void.—Priest v. Robinson, Kan., 67 Pac Rep. 850.

96. JUDGMENT - Trespass to Try Title. In trespass to try title, a judgment against several defendants from one of whom plaintiff purchased and under which the land was sold, held admissible over objection that a stipulation in the transfer to plaintiff released the co defendants.—Tinsley v. Corbett, Tex., 66 S. W. Rep. 91

97. JUDICIAL SALES - Payment of Debt.—Under Civ Code Prac. § 694, on ordering a sale of real property for the payment of a debt, the court was authorized to presume, in the absence of allegation or proof as to that matter, that a tract af 34 1-2 acres was divisible, and to adjudge a sale of only so much of the tract as was necessary to pay the debt. — Mays v. Carman, Ky., 66 S. W. Rep. 1019.

98. JURY - Question of Fact.—Whether a loss is total or partial is ordinarily a question of fact for the jury.—Liverpool & L. & G. Ins. Co. v. Heckman, Kan., 67 Pac. Rep. 879.

99. JURY - Summoning and Impaneling.—The method of summoning and impaneling juries provided for by statute is merely directory, and hence it is no objection to a panel that the court completes it by placing thereon citizens who were not summoned according to the statutes.—State v. Jackson, Mo., 66 S. W. Rep. 938.

100. JUSTICES OF THE PEACE—Defective Appeal Bond. — *Certiorari* from a justice cannot be dismissed on the ground of a former dismissal because of a defective appeal bond. — Smith v. Atlanta Guano Co., Ala., 31 South. Rep. 490

101. LANDLORD AND TENANT—Possession.—Defendant was not entitled to prove that he had obtained possession of the land from the tenant of plaintiff's lessor.—Terry v. Terry, Ky., 66 S W. Rep. 1024.

102. LANDLORD AND TENANT— Trespass to Try Title.—Proof of the prior possession of real estate being sufficient to sustain trespass to try title as against a mere trespasser, error assigned in the admission of evidence concerning plaintiff's title will not be considered on appeal. — Mumme v. McCloskey, Tex., 66 S. W. Rep. 853.

103. LANDLORD AND TENANT - Trover. — One cultivating land, the owner to furnish team, being but an employee, and having no title, but only lien on crop, cannot maintain trover for its conversion. — Jordan v. Lindsay, Ala., 31 South. Rep 484.

104. LARCENY - Erroneous Instruction — An instruction in a prosecution for larceny held erroneous, because authorizing a conviction if defendant bought the alleged stolen property from a third person without knowledge that such person did not own it.—Ward v. State, Ark., 66 S. W. Rep. 926.

105. LIBEL AND SLANDER—Libel Per Se.—A false publication that a person is implicated in a robbery and murder, and as "robber number three, who killed the farmer," held libelous *per se*. — Jones v. Murray, Mo., 66 S. W Rep 981.

106. LIMITATION OF ACTION—Resulting Trust. — Averment that M and complainants lived together in the quiet enjoyment of land held not equivalent to averment of recognition by M of complainants' right in the land, so to avoid the statute of limitations in suit for enforcement of resulting trust.—Martin v. Kelly, Ala , 31 South. Rep. 476.

107. MASTER AND SERVANT — Assumption of Risk.— A locomotive engineer's knowledge that his employer sometimes sent out brakemen who needed rest held insufficient to charge him with assumption of the risk of a brakeman going to sleep and leaving open a switch which it was his duty to close.- St Louis S. W. Ry. Co. v. Kelton, Tex , 66 S W. Rep. 887.

108 MORTGAGES — Bill to Enforce Redemption — Though a bill to enforce redemption from a mortgage sale does not allege delivery of possession on the first demand of the purchaser, where the demurrer does not point out the objection, it will not be considered. — Baker v. Burdeshaw, Ala., 31 South. Rep. 497.

109. MORTGAGES Evidence. — A deed executed by a mortgagee individually and as attorney in fact of the mortgagor held admissible, without evidence to show the existence of the power of attorney. — Hayes v. Banks, Ala., 31 South. Rep. 464.

110. MORTGAGES — Foreclosure. — Objection that, in foreclosure, complainants have only an equitable title, and that the holders of the legal title are not parties, may be made at the hearing, on error, or by the court *ex mero motu*.— Langley v. Andrews, Ala., 31 South. Rep. 469.

111. MORTGAGES—Payment. — Where the purchasers of property on which there was a mortgage paid the purchase money to a title company to which the mortgage bonds were payable, and that company retained a sufficient amount to extinguish the bonds, there was a payment of the bonds; the mortgagor having no notice that they had been assigned. — Fidelity Trust & Safety Vault Co. v. Carr, Ky., 66 S. W. Rep. 990.

112 MORTGAGES -Testimony of Notary. — The notary taking an acknowledgment may rebut the testimony of the grantor's wife that she did not understand the purport of the instrument. — Harrington v. Claflin, Tex., 66 S. W. Rep. 898.

113. MUNICIPAL CORPORATIONS — Appointment to Office. — Fact that mayor and aldermen may not agree on the appointee for vacant position of health officer of Houston held, under Sp. Laws 1897, p. 54, not to authorize mayor to make individual appointment.— Brumby v. Boyd, Tex., 66 S. W. Rep. 874.

114. MUNICIPAL CORPORATIONS — Constitutional Prohibition. — The motion by a board of aldermen without the mayor's concurrence, requesting a health inspector to discharge the duties and receive the compensation of health officer, is virtually an appointment to the position of health officer, and violates the constitution, prohibiting one person holding two offices. — Brumby v. Boyd, Tex., 66 S. W. Rep. 874.

115. MUNICIPAL CORPORATIONS - Franchise TAX. —City ordinances imposing annual franchise tax upon a street railway company as a condition for the granting of its city franchises held not to take away the city's right to improve an *ad valorem* tax upon such franchises as authorized by charter.—City of Dallas v. Dallas Consol. Electric St. Ry. Co., Tex., 66 S. W. Rep. 835.

116. NE EXEAT—Jurisdiction. — Under Act 1881, p. 63, §§ 1, 2, and Sand. & H. Dig. §§ 1115, 1293, entry of warning order in proceedings to enforce overdue taxes in record of law proceedings held not to give circuit court jurisdiction to enter decree of sale, so that a sale was void. — Pope v. Campbell, Ark., 66 S. W. Rep. 916.

117. NEGLIGENCE — Definition. — Definition of negligence as "the failing to exercise that degree of care which persons of ordinary prudence would thus use under the same or similar circumstances" was correct. —Milligan v. Texas & N. O. R. Co., Tex., 66 S. W. Rep. 896.

118. NEGLIGENCE - Personal Injury.— Where the facts alleged in an action for personal injuries show defendant's failure to perform a duty resting upon him, it is unnecessary to specifically aver the existence of such duty and the negligent failure to discharge it.—Postal Tel. Cable Co. v. Hulsey, Ala., 31 South. Rep. 527.

119. NEW TRIAL—Failure to Appear at Trial.—A showing as to the reason that an attorney failed to appear in an action in which judgment was rendered against his client held insufficient to authorize grant of a new trial. —Cromer v. Sgitcovich, Tex., 66 S. W. Rep. 882.

120. PARTIES—Amendment of Complaint.—The amendment of a complaint in an action on an unindorsed note, by the substitution of the payee as party plaintiff in place of the beneficial owner, held not invalid, as working an entire change of parties, under Code, § 29. — Cowan v. Campbell, Ala., 31 South. Rep. 429.

121. PARTNERSHIP — Firm Note. — The right of the holder of a firm note to collect from all the members held not affected by a dissolution and assumption of debts by two members, and granting further time for a valuable consideration from the new firm. — Norman v. Jackson Fertilizer Co., Miss., 31 South. Rep. 419.

122. PAYMENT—Pleading and Practice. — In determining the sufficiency of a petition to recover an overpayment of interest by mistake of payee, it cannot be assumed that the overpayment arose from a mistake of law.—Williams v. Carroll County, Mo., 66 S. W. Rep. 955.

123. PHYSICIANS AND SURGEONS — Pleadings.—An allegation in a bill of particulars to recover for medical services "that plaintiff is a physician and surgeon duly entitled to practice" does not, under Gen. St. 1897, ch. 100, §§ 392, 393, sufficiently allege such qualification and authority at the time the services were rendered, some months before action brought.—Westbroook v. Nelson, Kan., 67 Pac. Rep. 884.

124. PLEADING — Demurrer. — Where plaintiff, on the court's sustaining demurrers to replication declined to further plead, a judgment for defendants presenting pleas setting up a complete defense, to which no demurrer or replication was filed, will be affirmed. — Tobias v. Morris, Ala., 31 South. Rep. 498.

125. PLEADING — Forcible Entry and Detainer. — Demurrer to special pleas in an action for forcible entry and detainer held properly sustained, especially as any valid defense sought to be set up in the pleas could have been set up under the general issue. — Bibby v. Thomas, Ala., 31 South. Rep. 432.

126. PLEADING —Motion to Strike Out.—When a part of a plea in mitigation of a libel contains matters properly admissible in mitigation, a motion to strike out the whole plea is properly denied.— Jones v. Murray, Mo., 66 S. W. Rep. 981.

127. PLEADING—Variance. — An objection that a plea was at variance with the cause of action in the petition could not be raised by defendant; it having by special answer set forth a false issue, to which any reply would be sufficient.—Liverpool & L. & G. Ins. Co. v. Heckman, Kan., 67 Pac. Rep. 879.

128. PLEDGES — Levy on Stock. — The creditor of a stockholder, levying on the stock of the latter, held chargeable with notice that stock standing on the corporation books in the name of the stockholder was the same stock which had been transferred by the stockholder as collateral security.—Selma Bridge Co. v. Harris, Ala., 31 South. Rep. 508.

129. PLEDGES— Stock.—A transfer of corporation stock held to secure a debt mentioned therein and all other debts between the parties existing until the time of the payment of the enumerated debt, though created after transfer. — Selma Bridge Co. v. Harris, Ala., 31 South Rep. 508.

130. PRINCIPAL AND AGENT—Authority of Agent.—Train master held to have had authority to employ a physician to attend an injured employee, so that the railroad was liable for the services rendered.—Southern Ry. Co. v. Brister, Miss., 31 South. Rep. 440.

131. PRINCIPAL AND AGENT—Bills and Notes.—Liability of indorser on note secured by mortgage held not discharged with property of the person who buys the land, assuming the mortgage, and afterwards pays the note.—Beatty v Bulger, Tex., 66 S. W. Rep. 893.

132. PRINCIPAL AND AGENT—Estoppel.—Where the holder of a note has for years authorized and ratified the reception of interest payments by the payee of the note, he will be bound by a payment in good faith at the place of payment designated by the note to such payee. —Fowle v. Outcalt, Kan., 67 Pac. Rep. 889.

133. PRINCIPAL AND AGENT — Notice to Agent.—Evidence that an order for whisky, given one who represented himself as plaintiff's agent, was filled by plaintiff, is sufficient proof of agency; and a notice to the agent is binding on plaintiff.—Kelly v. Burke, Ala., 31 South. Rep. 512.

134. PRINCIPAL AND SURETY—Consideration.—Consideration moving from the maker of a note to the holder held sufficient to support an agreement to extend, thereby excusing the surety.—Bank of Horton v. Brooks, Kan., 67 Pac. Rep. 860.

135. PRINCIPAL AND SURETY - Limitations.—Where limitations do not begin to run against principal because of the concealment of his fraud, the surety on his bond cannot invoke the aid of the statute because innocent of fraud.—McMullen v. Winfield Building & Loan Assn., Kan., 67 Pac. Rep. 892.

136. PUBLIC LANDS—Tax Sale.—Under Gen. St. 1901, § 6354, where school lands have been sold at a tax sale for an amount substantially greater than the legal taxes, such sale does not cut off the rights of the holder of the school land certificate and authorize issue of a paten to said land by the state to the holder of the tax sale certificate.—Griffith v. Richards, Kan., 67 Pac. Rep. 846

137. PUBLIC LANDS — Trespass to Try Title.—The plaintiff in an action of trespass to try title between applicants to purchase school lands held to have the burden of showing that he had not purchased the quantity of land authorized by statute prior to the purchase of the land in question.—Nowlin v. Hall, Tex., 66 S. W. Rep. 851.

138. RAILROADS - Contributory Negligence. - In an action for fire set by a locomotive, judgment will not be directed for the company, in the absence of a finding of contributory negligence of plaintiff.—St. Louis & S. F. R. Co. v. Chace, Kan., 67 Pac. Rep. 853.

139. RAILROADS — Negligence.—A railway car is not of such a terrifying nature that its presence in a street is *per se* dangerous.—Atchison, T. & S. F. Ry. Co. v. Morris, Kan., 67 Pac. Rep. 837.

140. RAILROADS — Negligence.—Railroad company's failure to comply with an ordinance requiring it to maintain signal lights at all obstructions which it had placed in the streets near its track held negligence.— Houston, B. & N. Ry. Co. v. Pollard, Tex., 66 S. W. Rep. 851.

141. RAILROADS - Negligence.—It is negligence to make the customary noises incident to the movement of a train, where the servants in charge have reason to apprehend injury therefrom to the driver of a team near the track, whose perilous position they have discovered.—Louisville & N. R. Co. v. Penrod's Admr., Ky., 66 S. W. Rep. 1013.

142. RAILROADS - Negligence.—A person driving along a narrow road, with deep ditches at the sides, near to a pile driver in operation, without stopping, looking, or listening, when her horse became frightened, held negligent.—Yazoo & M. V. R. Co. v. Eakin, Miss , 31 South. Rep. 414.

143. RAILROADS—Trespasser.—Where deceased, when killed in a collision, was a trespasser on defendant's train, and the collision was the result of negligence of an engineer, defendant is not liable for his death —Feeback v. Missouri Pac. Ry. Co., Mo., 66 S. W. Rep. 965.

144. REFORMATION OF INSTRUMENTS — Foreclosure.—A bill will not lie to correct the description of land in a mortgage after foreclosure, sale, and confirmation.— Stephenson v. Harris, Ala., 31 South. Rep. 445.

145. REFORMATION OF INSTRUMENTS — Mistake of Law. —Where two persons, acting under a mutual mistake in regard to law, make a contract for the sale of certain realty, the fact that a certain interest in the land was not conveyed by such deed held no ground for reformation of the deed. - Jeakins v. Frazier, Kan., 67 Pac. Rep. 854.

146. SALES—Pleading.—In an action for goods sold and delivered, a demurrer was properly sustained to counts which did not aver a promise by defendant to pay for the goods alleged to have been delivered, nor set out sufficient facts from which a promise might be implied. —Kelly v. Burke, Ala., 31 South. Rep. 512.

147. SALES—Privilege of Pool-Selling.—A contract for sale of the exclusive privileges of book making and pool-selling upon a race track held not a lease, and hence the total amount agreed to be paid for such privileges could not be apportioned to the time during which the purchaser actually enjoyed the privileges sold.—Ullman v. St. Louis Fair Assn., Mo., 66 S. W. Rep. 949.

148. SCHOOLS AND SCHOOL DISTRICTS Taxes. - The right of a town and school district to exist and act as such corporations cannot be collaterally impeached in a suit to enjoin collection of school taxes.—Burnham v. Rogers, Mo., 66 S. W. Rep. 970.

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149. SHERIFFS AND CONSTABLES Execution Sale.—An officer making execution sale is not protected by his writ against the debtor, he having sold at a place other than and remote from that designated in the advertisement.—Brock v. Berry, Ala., 31 South. Rep. 547.

150. SPECIFIC PERFORMANCE—Statute of Frauds.—Payment to attorney, not shown authorized to receive it, held not partial payment within statute of frauds.—Robinson v. Driver, Ala., 31 South. Rep. 495.

151. STATUTES - Enrollment. — An enrolled statute is conclusive evidence of its passage, unless the journals of the legislature show affirmatively that the act was not regularly passed.—State v. Andrews, Kan., 67 Pac. Rep. 870.

152. SUNDAY Summons —A complaint filed on Sunday and a summons issued thereon by the clerk of the court is a ministerial act, and not prohibited by Rev. St. § 3866. —Havens v. Stiles, Idaho, 67 Pac. Rep. 919.

153. TAXATION - Ejectment.—Where plaintiff in ejectment relies on a void tax deed, he is entitled to a judgment for the taxes paid by him.—Standard Inv. Co. v. Freeman, Kan., 67 Pac. Rep. 859.

154. TAXATION—Judgment Lien.—Where the holder of a tax deed is defeated in an action for the recovery of the property, he is entitled to a judgment lien for such legal taxes as have been paid by him, together with costs and interest.—Polenqueen v. McAllister, Kan., 67 Pac. Rep. 826.

155. TAXATION—Pleadings. - Allegation in petition to recover personal taxes that the collector called on defendant at his place of business in A county and served him with an assessment blank is, after verdict, in absence of special demurrer, a good allegation of defendant's residence in the county.—State v. Renshaw, Mo., 66 S. W. Rep. 953.

156. TAXATION—Tax Sale.—Under Code § 4067, an assignment of a certificate of purchase at a tax sale of land by a separate writing does not authorize the probate judge to execute a deed to the assignee, and a deed so executed is void —Capehart v. McGahey, Ala., 31 South. Rep. 503.

157. TAXATION—Void Tax Sale.—The purchaser of real estate under a void tax sale, on the recovery of the land in trespass to try title brought by the owner thereof, who was not the person to whom the land was taxed, will not be subrogated to the rights of the state for taxes paid, or entitled to be reimbursed from the owner.—Mumme v. McCloskey, Tex., 66 S. W. Rep. 853.

158. TRESPASS TO TRY TITLE - Evidence. - In trespass to try title, a judgment under which plaintiff purchaser held not subject to be excluded as evidence on the ground that it was not shown that the land therein ordered sold was not sold in accordance with the judgment. - Tinsley v. Corbett, Tex., 66 S. W. Rep. 910.

159. TRIAL Conclusions Filed by Court.—If a party objects to the conclusions filed by the court in reference to his motion for conclusions of law and fact, he must point out in a motion for additional conclusions the facts on which he desires a finding.—Wetz v. Wetz, Tex., 66 S. W. Rep. 959

160. TRIAL Improper Remarks. — The remarks of defendant's counsel at the trial for libel that plaintiff committed the murder charged in the alleged libelous article should have been rebuked by the court. — Jones v. Murray, Mo., 66 S. W. Rep. 981.

161. TRIAL—Instructions. — Facts in an action against a railway company for personal injuries held to show that the court's use of the word "negligence" in its instructions, without indicating that the word required a high degree of care of the company, was not fatal error; no instruction to cure the error having been requested. Milligan v. Texas & N. O. R. Co., Tex., 66 S. W. Rep. 896.

162. TRIAL—Testimony. — The mere fact that a party testifies to a fact found not to exist in a former suit, by which he is concluded, does not authorize the rejection of his evidence as to other material facts by giving a general affirmative charge against him; but his evidence is sufficient to raise a jury question. — Callan v. Anderson, Ala., 31 South. Rep. 427.

163. TRUSTS - Application of Purchase Money.—Under Ky. St. § 4846, the purchaser of land sold for reinvestment under the provisions of a will need not look to the application of the purchase money, unless expressly so required by the devise. — Johnson v. Dumeyer, Ky., 66 S. W. Rep. 1025.

164. VENDOR AND PURCHASER — Equity of First Purchaser. — Where the holder of a title bond sold his equity, executing to the purchaser a new title bond, and thereafter attempted to sell his equity to another, delivering to him the original bond the equity of the first purchaser, being the older, must prevail.— Casteel v Baugh's Admr., Ky., 66 S. W. Rep. 996.

165. VENDOR AND PURCHASER—Executory Contract.—The purchaser of land by executory contract cannot resist payment of the price upon the ground that, after he purchased the land, it was sold under execution against the vendor, and he took deed from sheriff. — Fuson v. Lambdin, Ky., 66 S. W. Rep. 1004.

166. VENDOR AND PURCHASER—Vendor's Lien.—A vendor of land, whose deed retains a vendor's lien, may, on his vendee's default, bring trespass to try title, and recover the land without returning the part of the price paid.—Walsh v. Ford, Tex., 66 S. W. Rep 854.

167. WATERS AND WATER COURSES—Evidence. — Evidence that plaintiff's land was low and had overflowed before defendant company closed a culvert through its embankment and constructed a drain along its right of way held admissible as tending to show a complete defense for overflow from such closing. — Gulf, C. & S. F. Ry. Co. v. Wishart, Tex., 66 S. W. Rep. 860.

168. WILLS—Devisee's Right as Against Heir's Mortgagee.—Where a will was not probated for seven years after testator's death, and the only heir had taken possession of the land devised and executed a mortgage thereon, the devisees are not estopped to claim the land as against the mortgagee.—Reid's Admr. v. Benge, Ky., 66 S. W. Rep 997.

169. WILLS—Life Insurance.—The proceeds of a life insurance policy payable to the executor, administrator, or assigns of the insured, becoming a part of his estate on his death, may be disposed of by his will, under Rev. St. art. 5334 — Fletcher v. Williams, Tex., 66 S. W. Rep. 860.

170. WILLS - Probate.—A will may be probated at any time within 10 years after testator's death.—Reid's Admr. v. Benge, Ky., 66 S. W. Rep. 997.

171. WILLS—Sale of an Undivided Interest.—Where testator devised his entire estate to his children, to be equally divided, a proviso "that none of it shall be sold until my youngest child shall be of lawful age," does not prohibit any devisee from selling his undivided interest.—Roederer v. Hess, Ky., 66 S. W. Rep. 1012.

172. WILLS—Suit by Heir.—Under Rev. St art. 1869, an heir or devisee cannot maintain an action to recover property belonging to the estate, unless it is alleged and proved that there are no debts or necessity for administration, etc.—Lass v. Seidel, Tex., 66 S. W. Rep. 871.

173. WITNESSES—Evidence.—In a prosecution for assault with intent to murder, the state was properly permitted to show by the prosecutrix, who was hostile toward it, the state of feeling existing between her and accused. Baines v. State, Tex , 66 S. W. Rep. 847.

174. WITNESSES—Evidence.—Evidence of the possession of a pistol by a witness for the defense, in a prosecution for assault with intent to murder, held inadmissible to show that the witness was acting with defendant. Collins v. State, Tex., 66 S. W. Rep. 840.

175. WITNESSES Evidence. - Where a prisoner confined in jail handed a communication to a third person to his wife while visiting him, such communication was admissible in evidence, though taken from the wife against her will.—Ward v. State, Ark., 66 S. W. Rep. 926.